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NO. 99-7791

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

KESTUTIS ZADVYDAS,

Petitioner,

versus

LYNNE UNDERDOWN;
U.S. IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

_____

QUESTIONS PRESENTED FOR REVIEW

The general question presented by this case is whether the Constitution prohibits the prolonged indefinite detention of an immigrant after entry of a final order of deportation when deportation cannot be effectuated. The three subsidiary constitutional questions are:

99-7791
Zadvydas
v.
Underdown

I.

Whether the circuit court erred in ruling that "resident aliens," like "excludable aliens," can be indefinitely detained.

II.

Whether the circuit court improperly invoked the "plenary power doctrine" absent a question of national sovereignty or foreign relations.

III.

Whether the circuit court failed to recognize the fundamental nature of petitioner's liberty interest to be free from physical restraint.

REPORTS OF OPINIONS BELOW

The decision of the United States Court of Appeals for the Fifth Circuit is reported (**Zadvydas v. Underdown**, 185 F.3d 279 (5th Cir. 1999)), as is the decision of the United States District Court for the Eastern District of Louisiana (**Zadvydas v. Caplinger**, 986 F.Supp. 1011 (U.S.D.C., E.D.La. 1997)). The order denying the petition for rehearing issued on October 13, 1999, is unreported. Copies of all three documents are appended to this petition.

JURISDICTION

The decision by the United States Court of Appeals for the Fifth Circuit reversed the United States District Court for the Eastern District of Louisiana's order of October 30, 1997.

Consequently, petitioner files the instant application for a writ of certiorari under the authority of Title 28, United States Code, Section 1254(1).

BASIS OF FEDERAL JURISDICTION IN THE COURT OF FIRST INSTANCE

Jurisdiction was proper in the United States District Court for the Eastern District of Louisiana as this matter relates to a petition properly filed therein pursuant to Title 28, United States Code, Section 2241.

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment V - No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

(i) **Procedural History**.

On September 15, 1995, the petitioner, Kestutis Zadvydas, filed a pro se Petition for Writ of Habeas Corpus in the Western District of Louisiana contesting detention by the United States Immigration and Naturalization Service (INS). (R.A., Vol.1, pp.29-35.) On February 28, 1996, a United States District Judge in the Western District of Louisiana transferred this case to the Eastern District of Louisiana because the petitioner had been transferred from a federal detention center in Oakdale, Louisiana, to a center in New Orleans. (R.A., Vol.1, p.22.) The United States Magistrate Judge for the Eastern District of Louisiana held an evidentiary hearing on September 27, 1996. On February 3, 1997, after both parties filed supplemental memoranda in the case, the United States Magistrate Judge for the Eastern District of Louisiana issued his Report and Recommendation denying petitioner's application for habeas relief. (R.A., Vol.3, pp.709-732.) Petitioner objected to the Magistrate's Report and Recommendation and asked the district court to review the Magistrate's ruling. (R.A., Vol.3, pp.654-683.)

On October 30, 1997, the district court issued its Order and Reasons granting petitioner's writ of habeas corpus. The district court held that INS' indefinite detention of petitioner, pending deportation, violated his right to substantive due process. (R.A., Vol.3, pp.521-556.) On November 19, 1997, a psychiatric report was issued. The psychiatrist found the petitioner to be, "at the present time [neither] dangerous to himself; or to others. . . "

The district court held an additional hearing on November 21, 1997. After the hearing, the government filed a Motion to Alter or Amend Judgment. On November 26, 1997, the district court issued its formal judgment granting petitioner's writ of habeas corpus and ordered petitioner's release pursuant to Title 28, United States Code, Section 2241. The district court denied the government's Motion to Alter or Amend Judgment. (R.A., Vol.4, p.792.)

The government timely filed a Notice of Appeal. (R.A., Vol.4, pp.788-790.) On August 11, 1999, the United States Court of Appeals for the Fifth Circuit reversed the district court's decision. On October 13, 1999, the circuit court denied a petition for rehearing. The circuit court did stay the issuance of the mandate pending filing of this writ. A copy of the circuit court

opinion is attached, as is the district court opinion and the denial of the rehearing. (APPENDIX).

(ii) **Statement of Facts**

The petitioner was born on November 21, 1948, in a displaced persons' camp in a region of Germany governed by the United States following World War II. His parents were from Lithuania, but it is not clear whether either or both were ever citizens of that country.[1] In 1956, at the age of eight, petitioner was admitted into the United States in connection with a program for the relocation of displaced persons. The petitioner resided continuously in the United States for over forty years as a legal, permanent resident.

On December 8, 1966, Mr. Zadvydas was convicted in the New York Supreme Court, Queens County, of attempted robbery, third degree. On February 7, 1974, he was convicted in New York Supreme Court, Kings County, for attempted burglary, third degree.

The United States Immigration and Naturalization Service (INS) issued an order to show cause on July 6, 1977, alleging that Mr. Zadvydas was deportable. On July 13, 1977, the petitioner was

[1]His mother denies ever being a Lithuanian citizen.

granted release on his own recognizance and allowed to remain at large pending disposition of his deportation case.

In July, 1982, the INS notified him that his hearing before an immigration judge had been rescheduled to August 25, 1982. He failed to appear for his August hearing. The INS sent registered letters to his last known address but petitioner had moved and never received the letters. During this period, he married, parented a child, worked at gainful employment, filed income tax returns, and obtained an extension of reissuance of his immigration card (green card).

On August 17, 1992, petitioner was convicted in Circuit Court of Fairfax County, Virginia, for a 1987 offense of possession of a cocaine with intent to distribute. He was sentenced to sixteen years in jail with six years suspended. He served two years and was paroled in January, 1994. He was immediately taken into custody by the INS and deportation proceedings were begun. The INS detained Mr. Zadvydas without bond based upon his aggravated felony conviction. A bond determination hearing was held and the immigration judge denied the petitioner's request for a change in status and ordered that petitioner remain in custody without bond. The immigration judge based this decision on the likelihood that Mr. Zadvydas would fail to appear for future

immigration hearings. The Board of Immigration Appeals (BIA) denied Mr. Zadvydas' appeal.

On March 29, 1994, a deportation hearing was held. At that hearing, Mr. Zadvydas admitted all allegations and was found deportable. Seeking relief from deportation, the petitioner applied for a waiver under the Immigration and Nationality Act, which was denied on April 26, 1994. Mr. Zadvydas was then ordered deported from the United States to Germany.

In May, 1994 the INS Officer-In-Charge (OIC) in Oakdale, Louisiana, began petitioner's deportation which, as of today, has still not occurred. The petitioner emigrated from Germany when he was eight years old. Thirty-six years later, in response to an ambiguous question, he incorrectly represented to the immigration judge he was a German citizen. Germany, however, correctly informed the INS that he is not a German citizen even though he was born in a German holding camp. Lithuania also denies that petitioner is a citizen, even though his parents were once residents of Lithuania. Mr. Zadvydas has expressed a willingness to relocate to any country that will accept him. No country, however, has ever issued him travel documents. As such, petitioner is "stateless" and was being detained indefinitely since the INS was, and still is, unable to find a country that will grant him entry.

REASONS WHY CERTIORARI SHOULD BE GRANTED

Presently pending in the United States Court of Appeals for the Ninth Circuit is **Kim Ho Ma v. Janet Reno, et al**, Case Number 99-3596, which raises the same issues that are involved in the instant matter.[2] **Kim Ho Ma** is set for oral argument on February 14, 2000. It is respectfully requested that a ruling on this application for certiorari be deferred for a reasonable period to allow the Ninth Circuit to decide **Kim Ho Ma**. Should the Ninth Circuit rule for the resident alien, a split in the circuits would exist requiring this Court to resolve the conflict between the two circuit courts. In the event the Ninth Circuit follows **Zadvydas**, certiorari should be granted for the following reasons.

OVERVIEW

Certiorari should be granted to review the decision of the United States Court of Appeals for the Fifth Circuit because the circuit court held "resident aliens" and "excludable aliens" to be identically situated regarding their substantive due process

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[2]A five judge panel in Federal District Court ruled in favor of **Kim Ho Ma** and several deportable aliens, *sub nom*, **Phan v. Reno**, 56 F.Supp.2d 1149 (W.D. Wash., 1999).

right to be free from indefinite detention.[3] Petitioner was indefinitely detained because the Immigration and Naturalization Service's (INS') requests, to grant entry, made to the relevant countries (Lithuania and Germany) were denied. No country recognizes petitioner as a citizen, rendering him stateless.

The circuit court adopted the INS' argument that "once a resident alien . . . is ordered deported [he or she] may claim no greater [constitutional] rights than an excludable alien . . . " **Zadvydas v. Underdown**, 185 F.3d 279, 285 (5th Cir. 1999). Had the circuit court ruled for the petitioner, his status as a "person" under the Constitution would have mandated his release. If an individual is a "person," under the Constitution, he cannot be indefinitely confined civilly based solely on a finding of dangerousness. **Kansas v. Hendricks**, 521 U.S. 346, 358-61 (1997); **Foucha v. Louisiana**, 504 U.S. 71, 77 (1992); **Jones v. U.S.**, 463 U.S. 354, 363 (1983); **Addington v. Texas**, 441 U.S. 418, 428 (1979). However, pursuant to the regulations in effect when the circuit court rendered its decision, 8 C.F.R. 236.1(d)(2)(ii),

[3]Generally speaking, "resident aliens" are individuals who have entered the United States in compliance with the requirements of immigration laws and regulations. "Excludable aliens," while physically present within the United States, are legally classified under the "exclusion fiction" as never having entered the country.

236.1(d)(3)(iii), 241.4 and 241.5, as explained in Immigration and Naturalization Services (INS) Director Pearson's memorandum of February 3, 1999, an INS District Director needs only make a finding of dangerousness to indefinitely detain a person such as petitioner. **Zadvydas**, at 287.

No decision, either in this Court or the circuit courts, has so severely limited the rights of "resident aliens." For this reason, three important constitutional issues need to be resolved:

(1) Are "resident aliens" no longer persons under the Due Process Clause of the Constitution because their standing regarding indefinite detention now is indistinguishable from that of "excludable aliens?"

(2) Did the circuit court incorrectly invoke the "plenary power doctrine," absent issues of national sovereignty and foreign relations?

(3) Did the circuit court fail to recognize the fundamental nature of petitioner's liberty interest to be free from physical restraint?

1. Historically Resident Aliens Possess Greater Rights than Do Excludable Aliens.

Petitioner is not excludable. He is a former permanent legal resident alien subject to a final order of deportation. Once aliens are admitted, their constitutional status changes so that they enjoy due process rights including a fundamental liberty interest in personal freedom under the Fifth Amendment. **Reno v. Flores**, 507 U.S. 292, 315-316 (1993)(J. O'Connor, concurring). In reversing the district court, the appellate court reasoned that this Court's more recent decisions recognizing the greater rights of resident aliens in relation to excludable aliens were limited to procedural rights. The circuit court therefore incorrectly held that a resident alien's substantive due process right to personal liberty was the same as that afforded excludable aliens.

Admittedly, the authorities relied on by the circuit court are procedural due process decisions. However, the broad language in those cases recognizes the constitutional rights of resident aliens and contains no such limitation. These Supreme Court pronouncements demonstrate an expansion of due process rights for resident aliens, not, as the circuit court concluded, a narrowing of the protections afforded to such persons by the Fifth Amendment.

2. The Plenary Power Doctrine Does Not Require Courts to Defer to the INS' Prolonged Detention of Resident Aliens.

The plenary power doctrine places questions involving aliens outside the purview of the judiciary - deferring immigration matters to the political branches' discretion. Such agencies have unfettered authority to deport non-citizens. Although deference is accorded to the political branches in immigration matters, this Court now scrutinizes an individual's right to due process of law. **Reno v. Flores**, 507 U.S. 292, 305 (1993). The circuit court incorrectly invoked the plenary power doctrine where no national sovereignty or foreign relations concerns exist.

The government's sovereignty interest is greater in the case of an excludable alien than it is in the case of a resident alien. When a country like Cuba deposits thousands of aliens on our shores, the governmental interest in effectuating their expulsion (and not permitting them to enter) necessarily affects the United States' sovereignty. In contrast, this case concerns only a single deportable alien who the United States has already admitted. He cannot be deported because his purported country of origin will not accept him. The circuit court gives no explanation as to why a foreign government's refusal to accept such an alien

would be changed by either his confinement or his release. In sum, this case presents no national sovereignty or foreign relations issues.

3. The Circuit Court Failed to Recognize the Fundamental Nature of Petitioner's Liberty Interest to be Free From Physical Restraint.

The circuit court relegated the petitioner to a status it characterized as less than that of a citizen with respect to his Fifth Amendment right to personal liberty. This conclusion relies on rights that are far less fundamental than the right at issue here. The decisions cited involved protections such as a person's right to Medicare, employment, government services and freedom of speech. As is evident, none of those decisions held that continued, indefinite confinement of a resident alien was constitutionally permissible. Because the substantive due process protection at issue here is far more fundamental than the above rights, the petitioner submits that the circuit court's analogy simply does not apply under the facts of this case.

Since detention is one of the most serious deprivations of liberty that the government can impose, it is ordinarily reserved in this country as punishment for those convicted of

serious criminal offenses. Moreover, the Immigration and Naturalization Service (INS) does not possess the general detention power to incarcerate aliens in order to protect society; that is the role of the criminal justice system. The INS can only detain aliens for the purpose of facilitating their removal. Thus, because the INS is unable to effectuate petitioner's deportation, the INS no longer has a legitimate immigration interest in the petitioner's continued detention. Petitioner's continued detention is therefore excessive in relation to the government's immigration purpose. Petitioner's continued detention, with no end in sight, accordingly violates his right to due process of law.

LAW AND ARGUMENT

A. "Resident Aliens" are Persons Under the Due Process Clause Regarding Indefinite Detention.

This Court has repeatedly held that the source of due process protection is the alien's territorial presence in the United States, as well as the alien's ties to the United States that he develops as a result of that presence. See, **Plyler v. Doe**, 457 U.S. 202, 212 (1982); **Mathews v. Diaz**, 426 U.S. 67, 77 (1976); **Kwong Hai Chew v. Colding**, 344 U.S. 590, 596 (1952); **Wong Wing v. United States**, 163 U.S. 228, 237 (1986). See **Landon v. Plasencia**, 459 U.S. 21, 32 (1982); **Kwong Hai Chew**, 344 U.S. at 596, n.5.

Petitioner has lived in the United States continuously for the past forty-three years. His wife, daughter, mother, numerous brothers and sisters all reside in the United States. These ties, along with his territorial presence in the United States, are the basis for his constitutional status as a holder of due process rights. The entry of a final order of deportation does not now place him in the position of an excludable alien. Cf. **United States v. Witkovich**, 353 U.S. 194, 201 (1957)(recognizing that an alien with an outstanding final order of deportation

remains a "person" under the Due Process Clause and construing immigration statute narrowly to avoid constitutional defects that would otherwise arise).

This Court has long acknowledged a resident alien's constitutional rights. Given such longstanding acknowledgment, the Fifth Circuit errs in equating excludable aliens with resident aliens. The Fifth Circuit erred in holding "[t]he need to expel [resident aliens] is identical from a national sovereignty perspective [as that of excludable aliens]" **Zadvydas**, at p.296.

Excludable aliens and resident aliens are not identical. To reach the conclusion that the two groups are identical, the circuit court hinged its holding on a legal fiction that solely applies to excludable aliens, i.e. "[a]lthough an [excludable] alien is physically present in the U.S., 'his detention . . . is only a continuation of exclusion.'" **Thien Van Vo v. Joseph Green**, 63 F.Supp.2d 1278, 1283 (U.S.D.C. D.Colo. 1999).

By equating excludable aliens with long term permanent residents, the **Zadvydas** court ignores his legal admission into this country, his forty-three years in this country, and most importantly, his constitutional status acquired based on the above. If someone has never been excluded, there can be no continuation of exclusion. The case law favors resident aliens precisely because

their interests are so much stronger than that of someone who is attempting to gain entry into the United States. **Thien Van Vo**, 63 F.Supp.2d at 1283.

The circuit court further reasoned that "resident aliens" are not entitled to a substantive due process right to be free from physical restraint because to hold otherwise requires that "excludable aliens" be viewed "as non-persons wholly unprotected by the Constitution." **Zadvydas v. Underdown**, 185 F.3d 279, 296 (5th Cir. 1999). The circuit court stated that such a holding would conflict with two of its previous decisions involving "excludable aliens" making "excludable aliens" subject to the rack and the screw, the Eighth Amendment notwithstanding. **Zadvydas**, at 296. Citing, **Gisbert v. United States**, 988 F.2d 1437 (5th Cir. 1993); **Lynch v. Cannatella**, 810 F.2d 1363 (5th Cir. 1987).

Indeed, there is no conflict. Holding resident aliens to possess a substantive due process right to be free from indefinite detention is fully consistent with the holdings in **Gisbert** and **Lynch**. Both decisions employ a balancing test. In **Lynch**, an excludable alien's interest in being free from gross physical abuse outweighed the government's minimal immigration interest. **Gisbert** balanced excludable aliens' liberty interest against the governmental interest in protecting the national sovereignty from

Cuba depositing thousands of aliens on our shores. Here, Lithuania has not deposited even one individual on our shores. On the contrary, this country in 1956-57 decided to admit the Zadvydas' family - when they resided in Germany - it was the actions of the United States, not Lithuania, that brought the petitioner to this country. The circuit court gives no explanation as to how the INS' decision forty years later to deport the petitioner protects national sovereignty, or impacts relations between the United States and Lithuania.

The holding is based on the assumption that Congress' interest in detaining excludable aliens and its interest in detaining deportable aliens involve the same national sovereignty concerns. This is not so. Congress' interest in the two situations is extremely different. In the case of excludable aliens, Congress must prevent other nations from unilaterally shipping their citizens here. Without the detention of such persons, they could enter the United States simply by virtue of reaching United States' soil. Unlike excludable aliens - aliens who the United States has never agreed to admit - deportable aliens have, by definition, "entered" the United States in accordance with law. Congress has elected to admit such persons with, or without, the interference from other nations. While Congress may later

decide to remove those persons, its decision to admit is not influenced by the will of other nations; the "national sovereignty" interests at stake in the detention of excludables are not applicable to the detention of deportables. Accordingly, national sovereignty interests and foreign relations between the United States and Lithuania, do not depend in any manner on whether petitioner is confined or released.

As the circuit court candidly conceded, detention of resident aliens who cannot be removed is based on Congress' fear that the aliens "may commit crimes against the general population." **Zadvydas v. Underdown**, 185 F.3d 279, 296 (5th Cir. 1999). General crime reduction is not an immigration matter, and legislation that Congress passes in furtherance of crime reduction should not be governed by the reduced constitutional standard applicable to "excludable aliens."

B. The Plenary Power Doctrine is Not Applicable.

In reaching its decision, the United States Court of Appeals for the Fifth Circuit relied on two cases invoking the "plenary power doctrine." **Shaughnessy v. United States ex rel Mezei**, 345 U.S. 206 (1953); **United States ex rel Knauff v.**

Shaughnessy, 338 U.S. 537 (1950); **Zadvydas**, p.288. The plenary power doctrine places questions involving aliens outside the purview of the judiciary and, accordingly, defers immigration matters to the discretion of the political branches.

Mezei and **Knauff** "marked the high point of the plenary power doctrine. . .", Constitutional questions involving aliens are now scrutinized by this Court. Nancy Morawetz, *Rethinking Retroactive Deportation Laws And The Due Process Clause*, 73 N.Y.U.L. Rev. 97, 125-126 (1998). Although deference is still paid to the political branches in immigration matters, this Court has made "clear that there is some role to be played by this Court in such cases."

Two recent decisions in this area demonstrate a willingness to evaluate constitutional claims outside of the context of the plenary power doctrine. Morawetz, 73 N.Y.U.L. at p.129.[4]

In a case involving confinement of alien children pending deportation, this Court reached the constitutional issues despite noting that the regulation of the relationship between this country

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[4]Equally significant, **Mezei** is also distinguishable because it implicated national security concerns during the most dangerous period of the Cold War.

and "alien visitors has been committed to the political branches of the Federal Government." **Reno v. Flores**, 507 U.S. 292, 305 (1993)(quoting, **Mathews v. Diaz**, 426 U.S. 67, 81 (1976)). Justice O'Connor in her concurrence stated that the INS' actions were being upheld precisely because those actions complied "with [the] requirements of due process." **Flores**, at p.315. This Court in **Flores** concluded that it was duty bound to consider the constitutionality of the aliens' confinement. And, as Justice O'Connor noted, freedom from confinement for aliens as for other "persons" is a core liberty interest. **Flores**, citing, **Foucha v. Louisiana**, 504 U.S. 71, 80 (1992).

In **Landon v. Plasencia**, 459 U.S. 21, 34-35 (1982), the Court, while again noting "that control over matters of immigration is a sovereign prerogative, largely within the control of the Executive and the Legislature. . . ," nevertheless remanded the case to determine if the INS afforded due process to the resident alien. The Court balanced the government's interest (the efficient administration of the immigration laws) against the interest of the resident alien to stay, work and live in the United States. **Plasencia**, 459 U.S. at 21. **Plasencia** made clear that whatever role plenary power once played in immigration cases, it no longer simply places constitutional questions outside the reach of the judiciary.

The circuit court twice invoked the "plenary power doctrine" to place the petitioner's detention beyond constitutional scrutiny. First, as discussed above, the court found petitioner's situation indistinguishable from that of excludable aliens. As a result, the decision conjured up prospects that national sovereignty was somehow protected by petitioner's indefinite detention. Secondly, the court found that the "plenary power doctrine" precluded releasing the petitioner because this Court, "has accepted collateral damage to the constitutional rights of citizens as an acceptable price to pay in deference to the plenary power over aliens of the political branches of . . . government." **Zadvydas**, p.289.

No case has ever found the Due Process Clause to be unavailable to a "resident alien" who has been indefinitely detained based on the doctrine of plenary power. Essentially, the circuit court has extended **Mezei**, which at best allows detention of excludable aliens, to legally permit the indefinite detention of "resident aliens." In support of this groundbreaking legal precedent, the court cited **Mathews v. Diaz**, 426 U.S. 67, 96 (1976), a case that does not even discuss, much less rely on, the plenary

power doctrine.[5] The circuit court cites a statement from **Diaz** noting that the INS' authority, generally, is broader than allowed in most other legal arenas. None of the cases cited involved the detention of resident aliens. Rather, the cases only gave an overall view of the INS' authority. Moreover, **Diaz** employed a "rational basis test." As will be discussed, questions involving deprivation of liberty are decided under the strict scrutiny standard.

In sum, the plenary power doctrine has never authorized the indefinite detention of resident aliens and should not here. Because petitioner's detention bears no relation whatsoever to either the protection of national sovereignty or the facilitation of foreign relations no purpose is served in his indefinite detention.

C. The Petitioner's Liberty Interest is Far More Fundamental than the Rights Relied On By the Circuit Court in Its Decision.

The circuit court cited a number of decisions by this Court to demonstrate an alien's diminished status under the

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[5]An oblique reference is made to this doctrine in a footnote which cites several cases employing the doctrine. **Mathews v. Diaz**, p.82, n.17.

Constitution in contrast to that afforded citizens. The cases are not analogous because an individual's right to personal liberty is far more fundamental than the rights at issue in those decisions.

The cases in question dealt with a person's right to Medicare, employment, government services and freedom of speech. **Cabell v. Chaves-Saldino**, 454 U.S. 432 (1982)(state's preclusion of resident aliens from basic governmental functions); **DeConces v. Bica**, 424 U.S. 351 (1976)(state's exclusion of illegal resident aliens from maintaining employment within its borders); **Matthews v. Diaz**, 426 U.S. 67 (1976)(denial of Medicare by federal government, to lawful resident aliens who have resided in United States less than five years); **Kleindienst v. Mandel**, 408 U.S. 753 (1972)(denial, through exclusion, of alien's First Amendment right to speak and denied of United States citizen's First Amendment right to communicate with aliens espousing Marxist's beliefs); and **United States v. Williams**, 194 U.S. 279 (1904)(similar to **Kleindienst**, alien placed in exclusion proceedings in violation of his First Amendment right to freedom of speech).

As is evident, none of these decisions held that continued, indefinite confinement of a resident alien was constitutionally permissible. The circuit court cites no authority other than the above cases to support its holding that the Due

Process Clause does not bestow a right to personal liberty on resident aliens under final orders. Because the substantive due process protection at issue here is far more fundamental than the rights that were the focus of the above cases, petitioner submits that the lower court's analogy simply does not apply under the facts of this case.

D. Conclusion

Clearly, petitioner's confinement was civil in nature. This Court has ruled that "civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection." **Addington v. Texas**, 441 U.S. 418, 425 (1979). This Court further concluded that, "freedom from bodily restraint has always been at the core of the liberty [interest] protected by the Due Process Clause from arbitrary governmental action." **Foucha v. Louisiana**, 504 U.S. 71, 80 (1992). The "right to be free from, and to obtain judicial relief for, unjustified intrusions on personal security" is a traditional liberty protected by the Due Process Clause. **Vitek v. Jones**, 445 U.S. 480, 492 (1980) (quoting **Ingraham v. Wright**, 430 U.S. 651, 673 (1977)).

Government incarceration is the classic deprivation of liberty, which the government may not accomplish without according the guarantees of due process. **Foucha** at p.80; **See also**,

Cabreja-Rojas v. Reno, 999 F.Supp. 493, 496 (S.D.N.Y. 1998)(holding that an alien detained pursuant to final order of deportation has a private interest in freedom from confinement, a liberty interest of the highest constitutional order); **St. John v. McElroy**, 917 F.Supp. 243, 250 (S.D. N.Y. 1996); **Ekekhor v. Aljets**, 979 F.Supp. 640 (N.D. Ill. 1997).

The circuit court found that protecting society from potentially dangerous aliens provided a rational purpose for continuing his incarceration. Apparently, the likelihood, or more to the point here, unlikelihood of petitioner being deported in the foreseeable future is not even a factor to be considered in determining the constitutionality of his incarceration.[6] This

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[6]For the same reason this country will not grant petitioner citizenship, other countries are also likely to decline him citizenship. Lithuania precludes citizenship to "persons who, before coming to Lithuania, have been sentenced in another state to imprisonment for a deliberate crime for which criminal liability is imposed by the laws of the Republic of Lithuania . . ." Ruta M. Kalvaitis, *Citizenship and National Identity in the Baltics*, 16 Boston Univ. International Law Journal 231, 266-267 (1998). Kestutis Zadvydas has two burglary convictions and a robbery conviction. Burglary and robbery are *mala in se* offenses and would be crimes in any country.

Additionally, two international conventions, the *Status Convention* and *Reduction Convention* address the issue of statelessness. Kalvaitis, at p.251. Lithuania has not signed either convention. Kalvaitis at pp.252-253. However, even if Lithuania becomes a signatory to the *Reduction Convention*, the convention allows a state to deny citizenship to stateless

conclusion is incorrect for two reasons: 1) because petitioner cannot be removed from the United States, his detention does not serve the purpose of effectuating his deportation; 2) a finding of dangerousness alone cannot justify the deprivation of an individual's liberty.[7] See, **e.g.**, **Kansas v. Hendricks**, 521 U.S. 346 (1997)(dangerousness alone is not enough to justify civil commitment); **Foucha v. Louisiana**, 504 U.S. 71, 77 (1992)(striking

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persons who have been convicted of a criminal offense. Kalvaitis, p.267. So not only does Lithuanian law preclude citizenship to stateless criminals, so does international law as embodied in the *Reduction Convention*. Petitioner, if reincarcerated, still would have no end in sight to his confinement.

[7]The petitioner is not dangerous. Despite the Temporary Period Custody Rules (TPCR) having been in effect for over a year of his custody, the INS while advising the district court that it reviewed petitioner's status under the TPCR, also advised that it had determined that he could not be released under those rules. While the INS told the district court that it determined that the petitioner was dangerous, it never explained how it reached this conclusion. The determination of dangerousness was made without benefit of a psychiatrist or other mental health professional. It was not until the district court issued its October 30, 1997, order that the INS endeavored to obtain the opinion of a psychiatric expert at the court's direction. On November 19, 1997, in anticipation of petitioner's release, a psychiatrist concluded petitioner was not a danger to himself, nor was he a danger to others. The government, in reference to this finding, has never produced evidence disputing the psychiatric evaluation. Indeed, the circuit court, based on the government's acknowledgment at oral argument, states petitioner has "complied with the district court's release conditions and. . . conducted himself as a productive member of society." **Zadvydas**, p.284.

down a state statute that authorized continued confinement of insanity acquittees who were no longer mentally ill, but who remained dangerous). Dangerousness can justify temporary detention pending criminal process, but not prolonged detention. See, **United States v. Salerno**, 481 U.S. 739, 747 n.4 (1987)(suggesting that pretrial detention can become excessively prolonged and thereby violate Due Process Clause).

Because this case concerns the deprivation of liberty, it triggers a strict scrutiny standard in determining whether that deprivation violated due process and under that standard any infringement of personal liberty must be narrowly tailored to serve a compelling government interest. **Thien Van Vo**, at p.1284 (citing; **Reno v. Flores** and **United States v. Salerno**, 481 U.S. 739 (1987)). For detention to serve a compelling government interest, it first must be determined whether it was imposed for the purpose of punishment or for some other governmental purpose. **Schall v. Martin**, 467 U.S. 253 (1984).

Here, there is no intent to punish so detention is incidental to another government purpose, namely, removal of the alien. It therefore must be determined if detention appears excessive in relation to that purpose. **Thien Van Vo v. Joseph Green**, 63 F.Supp.2d 1278, 1284 (U.S.D.C., D.Colo. 1999).

If it is less likely that the INS can actually deport the alien, then the government's interest in detaining him becomes less compelling and the deprivation of the resident alien's liberty more severe. The petitioner's deportation depends on the occurrence of one, or more, of several very unlikely events: 1) the location of seventy year old birth records somewhere in Lithuania which the government, after five and a half years, as of this date, has not even initiated a search for;[8] 2) some other country granting the petitioner citizenship and allowing him to repatriate, even though his ties with other nations are even more tenuous than with Lithuania; and 3) the highly unlikely prospect that other countries will invite him to become a citizen despite his criminal history. In view of these considerations, the petitioner's detention was excessive in relation to the purpose for which it was being imposed because deportation was not, and is not, realizable in the foreseeable future.

The district court, using the above analysis, found that, "petitioner's detention . . . with no end in sight. . . is an

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[8]Lithuania and Germany have both responded that petitioner is not a citizen and refused to repatriate him. Lithuania stated that it would review his status if he could produce his parents' Lithuanian passport or Lithuanian birth certificate; none of these documents exist to the best of petitioner's and his family's knowledge.

excessive means of accomplishing the purpose sought [deportation] . . . " **Zadvydas v. Caplinger**, 986 F.Supp. 1011, 1027 (U.S.D.C., E.D.La. 1997). The district court further reasoned that when, "deportation is not realizable . . . continued detention . . . loses its *raison d'etre*." At p.1026. Petitioner's detention does not protect the national sovereignty, nor does it affect foreign relations. His confinement serves only one purpose and that is Congress' attempt to effect a general reduction in crime. Until the circuit court's decision, an individual could not be incarcerated for a crime without first being convicted at trial or, if civilly committed, he could not be confined based solely on a finding of dangerousness. Because the INS has indefinitely detained petitioner, a deportable alien, based solely on his alleged dangerousness, his continued confinement violates his right to due process of law.

RELIEF REQUESTED

WHEREFORE, this Honorable Court is urged to grant a Writ of Certiorari, vacate the ruling of the United States Court of Appeals for the Fifth Circuit, and reinstate the judgment of the district court granting petitioner's writ of habeas corpus. It is also respectfully requested that this Honorable Court defer ruling on this application for a writ of certiorari for a reasonable period to allow the Ninth Circuit to decide **Kim Ho Ma**.

Respectfully submitted this 11th day of January, 2000.

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LSBA NO. 2760

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

KESTUTIS ZADVYDAS,

Petitioner,

versus

LYNNE UNDERDOWN;
U.S. IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

A P P E N D I X

1. Opinion of the United States District Court for the Eastern District of Louisiana.

2. Opinion of the United States Court of Appeals for the Fifth Circuit.

3. Order denying petition for rehearing/reconsideration.

APPENDIX "A"

Kestutis ZADVYDAS, Plaintiff,
v.
John B.Z. CAPLINGER and Immigration and Naturalization Service, Defendants.

Civil Action No. 96-0810.

United States District Court,
E.D. Louisiana.

Oct. 30, 1997.

Alien objected to report and recommendation of United States Magistrate Judge Moore, which recommended that his application for writ of habeas corpus be denied. The District Court, Fallon, J., held that: (1) alien was not deprived of due process, given that his waiver of counsel during deportation hearing was constitutionally valid and there was no fundamental unfairness in immigration judge's acceptance of this waiver, and (2) four year detention of legal alien who was under final order of deportation and who was aggravated felon was excessive and violated alien's right to substantive due process.

Writ granted.

[1] ALIENS ⇐40
24k40
Immigration and Nationality Act (INA) section governing judicial review of removal orders, as amended by Illegal Immigration and Reform and Immigrant and Responsibility Act (IIRIRA), applies retroactively, without limitation to claims arising from all past, pending, or future exclusion, deportation, or removal proceedings. Immigration and Nationality Act, §§ 242, 242(g), as amended, 8 U.S.C.A. §§ 1252, 1252(g).

[2] HABEAS CORPUS ⇐447
197k447
Habeas corpus will lie to protect fundamental liberties guaranteed under Constitution. 28 U.S.C.A. § 2241.

[3] HABEAS CORPUS ⇐205
197k205
Congress did not repeal, by implication, statute establishing federal courts' power to grant writ of habeas corpus by enacting Illegal Immigration and Reform and Immigrant and Responsibility Act (IIRIRA); IIRIRA did not amend, or even mention, statute. 28 U.S.C.A. § 2241; Immigration and Nationality Act, § 101 et seq., as amended, 8 U.S.C.A. § 1101 et seq.

[4] HABEAS CORPUS ⇐521
197k521
Habeas corpus review is justified if alien subject to order of deportation based on violation of crimes enumerated by Congress demonstrates some grave constitutional error or fundamental miscarriage of justice. U.S.C.A. Const. Art. 1, § 9, cl. 2; 28 U.S.C.A. § 2241.

[5] CONSTITUTIONAL LAW ⇐253(1)
92k253(1)
Substantive due process prevents government from engaging in conduct that shocks conscience or interferes with rights implicit in concept of ordered liberty. U.S.C.A. Const.Amend. 5.

[6] CONSTITUTIONAL LAW ⇐255(1)
92k255(1)
Procedural due process ensures that government action depriving person of life, liberty, or property is implemented in fair manner. U.S.C.A. Const.Amend. 5.

[6] CONSTITUTIONAL LAW ⇐278(1)
92k278(1)
Procedural due process ensures that government action depriving person of life, liberty, or property is implemented in fair manner. U.S.C.A. Const.Amend. 5.

[7] CONSTITUTIONAL LAW ⇐274.3
92k274.3
Fifth Amendment entitles aliens to due process of law in deportation proceedings, and accordingly, immigration judge must conduct deportation hearings in accord with standards of due process. U.S.C.A. Const.Amend. 5.

[8] CONSTITUTIONAL LAW ⇐274.3
92k274.3
Due process violation exists when defect in deportation hearing impinges upon fundamental fairness of hearing and there exists substantial prejudice. U.S.C.A. Const.Amend. 5.

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[9] ALIENS ⇐54(4)
24k54(4)
Although Congress has provided by statute that alien has right to obtain counsel at his own expense, alien does not have Sixth Amendment right to counsel in immigration proceeding; any right alien may have in this regard is grounded in Fifth Amendment guarantee of due process, rather than Sixth Amendment right to counsel. U.S.C.A. Const.Amends. 5, 6.

[9] CONSTITUTIONAL LAW ⇐274.3
92k274.3
Although Congress has provided by statute that alien has right to obtain counsel at his own expense, alien does not have Sixth Amendment right to counsel in immigration proceeding; any right alien may have in this regard is grounded in Fifth Amendment guarantee of due process, rather than Sixth Amendment right to counsel. U.S.C.A. Const.Amends. 5, 6.

[10] CRIMINAL LAW ⇐641.4(2)
110k641.4(2)
In order for waiver of right to counsel to be valid, it must be made knowingly and intelligently. U.S.C.A. Const.Amend. 6.

[11] CONSTITUTIONAL LAW ⇐274.3
92k274.3
If alien's waiver of counsel was not made knowingly or intelligently, then immigration judge's acceptance of it constitutes due process violation if it impinged upon fundamental fairness of hearing and resulted in substantial prejudice. U.S.C.A. Const.Amend. 5.

[12] CRIMINAL LAW ⇐641.4(2)
110k641.4(2)
Whether waiver of right to counsel has been made knowingly and intelligently depends upon particular facts and circumstances surrounding case, including background, experience, and conduct of accused. U.S.C.A. Const.Amend. 6.

[13] CRIMINAL LAW ⇐273.1(1)
110k273.1(1)
Test for determining validity of guilty plea is whether plea represents voluntary and intelligent choice among alternative courses of action open to defendant.

[14] ALIENS ⇐54(4)
24k54(4)
Alien was not deprived of due process, given that his waiver of counsel during deportation hearing was constitutionally valid and there was no fundamental unfairness in immigration judge's acceptance of this waiver; alien should have known about value of counsel in legal proceedings due to his extensive first hand knowledge of criminal justice system, and he was specifically told that he had right to counsel and was advised about ramifications and possible consequences of his admissions. U.S.C.A. Const.Amend. 5.

[14] CONSTITUTIONAL LAW ⇐274.3
92k274.3
Alien was not deprived of due process, given that his waiver of counsel during deportation hearing was constitutionally valid and there was no fundamental unfairness in immigration judge's acceptance of this waiver; alien should have known about value of counsel in legal proceedings due to his extensive first hand knowledge of criminal justice system, and he was specifically told that he had right to counsel and was advised about ramifications and possible consequences of his admissions. U.S.C.A. Const.Amend. 5.

[15] ALIENS ⇐54(3.1)
24k54(3.1)
Nature of deportation hearing is civil in nature, and consistent with civil nature of proceeding, various protections that apply in context of criminal trial do not apply in deportation.

[16] ALIENS ⇐54(4)
24k54(4)
Waiver of counsel in deportation hearing need not be made with apprehension of range of allowable punishments and all other facts essential to broad understanding of matter.

[17] ALIENS ⇐54(4)
24k54(4)
Fact that immigration judge failed to inform alien of possibility of prolonged detention did not alter fact that his waiver of counsel in deportation hearing was made knowingly.

[18] ALIENS ⇐54.1(2)
24k54.1(2)
Alien bears burden of demonstrating that his request for waiver of deportability warrants favorable

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consideration pursuant to Immigration and Nationality Act (INA) section permitting aliens admitted for permanent residence who have maintained lawful domicile in United States for seven consecutive years to continue residing in United States, in Attorney General's discretion, notwithstanding their deportability under other sections of Act. Immigration and Nationality Act, § 212(c), as amended, 8 U.S.C.A. § 1182(c).

[19] ALIENS ⇐53.10(2)
24k53.10(2)
Attorney General has unusually broad discretion in granting and denying waivers of deportability pursuant to Immigration and Nationality Act (INA) section permitting aliens admitted for permanent residence who have maintained lawful domicile in United States for seven consecutive years to continue residing in United States, in Attorney General's discretion, notwithstanding their deportability under other sections of Act. Immigration and Nationality Act, § 212(c), as amended, 8 U.S.C.A. § 1182(c).

[20] ALIENS ⇐53.10(1)
24k53.10(1)
Decision to grant waiver of deportability is within sole discretion of immigration judge. Immigration and Nationality Act, § 212(c), as amended, 8 U.S.C.A. § 1182(c).

[21] ALIENS ⇐54(4)
24k54(4)
Alien's lack of affidavits did not impinge upon fundamental fairness of deportation hearing or substantially prejudice him so as to give rise to due process violation; despite lack of affidavits outlining hardship, immigration judge assumed that deportation would adversely affect alien, and he then balanced adverse factors evidencing alien's undesirability as permanent resident with social and humane considerations presented in alien's behalf to determine whether to grant waiver of deportability. U.S.C.A. Const.Amend. 5; Immigration and Nationality Act, § 212(c), as amended, 8 U.S.C.A. § 1182(c).

[21] CONSTITUTIONAL LAW ⇐274.3
92k274.3
Alien's lack of affidavits did not impinge upon fundamental fairness of deportation hearing or substantially prejudice him so as to give rise to due process violation; despite lack of affidavits outlining hardship, immigration judge assumed that deportation would adversely affect alien, and he then balanced adverse factors evidencing alien's undesirability as permanent resident with social and humane considerations presented in alien's behalf to determine whether to grant waiver of deportability. U.S.C.A. Const.Amend. 5; Immigration and Nationality Act, § 212(c), as amended, 8 U.S.C.A. § 1182(c).

[22] CONSTITUTIONAL LAW ⇐274.3
92k274.3
Due process challenge requires showing of substantial prejudice to petitioning alien. U.S.C.A. Const.Amend. 5.

[23] CONSTITUTIONAL LAW ⇐274.3
92k274.3
To render deportation hearing unfair for due process purposes, defect or practice complained of must have been such as might have led to denial of justice or there must have been absent element deemed essential to due process. U.S.C.A. Const.Amend. 5.

[24] ALIENS ⇐54(4)
24k54(4)
Immigration judge's failure to inform alien of his right to submit affidavits from relatives in deportation hearing did not lead to denial of justice or due process. U.S.C.A. Const.Amend. 5; Immigration and Nationality Act, § 212(c), as amended, 8 U.S.C.A. § 1182(c).

[24] CONSTITUTIONAL LAW ⇐274.3
92k274.3
Immigration judge's failure to inform alien of his right to submit affidavits from relatives in deportation hearing did not lead to denial of justice or due process. U.S.C.A. Const.Amend. 5; Immigration and Nationality Act, § 212(c), as amended, 8 U.S.C.A. § 1182(c).

[25] ALIENS ⇐53.9
24k53.9
Aliens, both legal and illegal, are entitled to constitutional protection of due process, equal protection, and reasonable bail. U.S.C.A. Const.Amend. 5.

[25] CONSTITUTIONAL LAW ⇐210(1)

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92k210(1)
Aliens, both legal and illegal, are entitled to constitutional protection of due process, equal protection, and reasonable bail. U.S.C.A. Const.Amend. 5.

[25] CONSTITUTIONAL LAW ⇐252
92k252
Aliens, both legal and illegal, are entitled to constitutional protection of due process, equal protection, and reasonable bail. U.S.C.A. Const.Amend. 5.

[26] ALIENS ⇐53
24k53
Legal aliens subject to deportation generally are granted greater substantive rights than are excludable aliens.

[27] ALIENS ⇐53.9
24k53.9
Indefinite detention of deportable aliens who are aggravated felons is statutorily authorized when immediate deportation is not possible and alien has not overcome presumption against his release.

[28] CONSTITUTIONAL LAW ⇐252
92k252
Fifth Amendment's mandate that no person shall be deprived of life, liberty, or property without due process of law extends due process protection to persons within territorial United States and not just to United States citizens. U.S.C.A. Const.Amend. 5.

[29] ALIENS ⇐53.9
24k53.9
Detention of alien pending deportation is properly analogized to incarceration pending trial or other disposition of criminal charge and, thus, is justifiable only as temporary measure.

[30] ALIENS ⇐53.9
24k53.9
Four year detention of legal alien who was under final order of deportation and who was aggravated felon was excessive and violated alien's right to substantive due process, although lengthy detention was due to Immigration and Naturalization Service's (INS) failure to find country to take him. U.S.C.A. Const.Amend. 5; Immigration and Nationality Act, § 242(a), as amended, 8 U.S.C.A. § 1252(a).

[30] CONSTITUTIONAL LAW ⇐274.3
92k274.3
Four year detention of legal alien who was under final order of deportation and who was aggravated felon was excessive and violated alien's right to substantive due process, although lengthy detention was due to Immigration and Naturalization Service's (INS) failure to find country to take him. U.S.C.A. Const.Amend. 5; Immigration and Nationality Act, § 242(a), as amended, 8 U.S.C.A. § 1252(a).

*1014 Robert F. Barnard, Federal Public Defender, New Orleans, LA, for Kestutis Zadvydas.

Matilda Ann Baker, U.S. Immigration & Naturalization Service, New Orleans, LA, Kathryn Weekley Becnel, U.S. Atty.'s Office, New Orleans, LA, for John B.Z. Caplinger, Immigration and Naturalization Service.

ORDER AND REASONS

FALLON, District Judge.

Before this Court is petitioner Kestutis Zadvydas' objection to the report and recommendation of United States Magistrate Judge Louis Moore, Jr., which recommends that the petitioner's application for a writ of habeas corpus, pursuant to 28 U.S.C. § 2241, be denied. For the reasons that follow, the petitioner's objection is sustained in part, in that the Court finds that the petitioner's detention pending deportation violates his right to substantive due process, and denied in part, in that it is denied in all other respects. The petition for writ of habeas corpus is GRANTED subject to the conditions hereinafter described.

I.
BACKGROUND:

The petitioner was born on November 21, 1948 in a displaced persons' camp in a region of Germany governed by the United States following World War II. His parents were from Lithuania but it is not clear whether either or both were ever citizens of that country. [FN1] In 1956, at the age of 8, petitioner was admitted to the United States in connection with a program for the relocation of displaced persons.

FN1. His mother denies ever being a Lithuanian citizen.

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On December 8, 1966 petitioner was convicted in the New York Supreme Court, Queens County, of attempted robbery, third degree. On February 7, 1974 he was convicted in New York Supreme Court, Kings County, for attempted burglary, third degree.

The Immigration and Naturalization Service (INS) issued an order to show cause on July 6, 1977 charging petitioner as deportable. On July 13, 1977 petitioner was granted release on his own recognizance and allowed to remain at large pending disposition of his deportation case.

In July 1982 the INS notified petitioner that his hearing before an immigration judge had been rescheduled to August 25, 1982. He failed to appear for his August hearing. He was not heard from for 10 years. INS sent registered letters to his last known address in an attempt to find him. Petitioner apparently moved and claims he never received the letters. During this decade he married, parented a child, was gainfully employed, filed income tax returns, and obtained an extension or reissuance of his immigration card (green card).

On August 17, 1992 petitioner was convicted in Circuit Court of Fairfax County, Virginia for a 1987 offense of possession of a controlled drug (Cocaine) with intent to distribute. Petitioner turned himself in to the police in Houston and was removed to Virginia where he faced the drug charges which *1015 led to his conviction. He was sentenced to serve 16 years with 6 years suspended. He served 2 years of his sentence and was released on parole in January 1994. He was immediately taken into custody by the INS and deportation proceedings were begun again. The INS detained the petitioner without bond based upon his aggravated felony conviction. A bond determination hearing was held and the Immigration Judge denied the petitioner's request for a change in status ordering that he remain in custody without bond. The Immigration Judge based this decision on the likelihood that the petitioner would fail to appear for future immigration hearings because of his prior history. The Board of Immigration Appeals (BIA) denied petitioner's appeal.

On March 29, 1994, petitioner's deportation hearing was held. He admitted all allegations and was found deportable. Seeking relief from deportation, the petitioner applied for a waiver under the Immigration and Nationality Act, which was denied on April 26, 1994. The petitioner was ordered deported from the United States to Germany.

In May of 1994, the INS Officer-in-Charge (OIC) in Oakdale, Louisiana began the petitioner's deportation which, as of today, has still not occurred. Although the petitioner immigrated from Germany and represented to the Immigration Judge he was a German citizen, the German government informed the INS that the petitioner is not a German citizen. Rather, he was born in a German holding camp; his parents were once residents of Lithuania. Lithuania has also denied the petitioner's citizenship. Thus, the petitioner is "stateless" and is being detained indefinitely since the INS is unable to find a country that will claim him. [FN2]

FN2. At the time of this writing the petitioner was still being held pending deportation. As of October 1997 the petitioner has been detained for three years and nine months.

The petitioner has applied to this Court for habeas corpus relief on grounds that his indefinite detention pending deportation is unconstitutional. The petitioner asserts the following arguments: 1) that he never made a knowing waiver of his constitutional rights, including his right to counsel; 2) that his detention violates international law; 3) that his detention violates due process; 4) that his detention is in effect one for life and thus violates the Eighth Amendment's prohibition against cruel and unusual punishment.

After a thorough review of the record, Magistrate Judge Louis Moore recommended that the petitioner's request for habeas corpus relief be denied. Judge Moore found that the continued detention of the petitioner was statutorily authorized and that the Attorney General did not abuse her discretion in detaining the petitioner. Judge Moore based his finding on the petitioner's prior failure to appear for his initial deportation proceeding and his prior convictions. In addition, Judge Moore found that the petitioner participated knowingly in his proceeding and that his waiver of his right to counsel was voluntary. Lastly, Judge Moore found that neither International Law nor the Eighth

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Amendment were violated. Because the INS' efforts to deport the petitioner remained ongoing, Judge Moore reasoned that the petitioner was not being arbitrarily imprisoned for an indefinite amount of time.

The petitioner now moves this Court to reconsider Judge Moore's report and recommendation under 28 U.S.C. § 636(b)(1)(C). Petitioner asserts that Judge Moore erred in finding that petitioner's original hearing comported with due process and in finding that petitioner's detention was constitutional. The INS urges its original arguments but also asserts that, because of the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Judge Moore as well as this Court has no jurisdiction to review any claims stemming from the petitioner's deportation order.

II.
JURISDICTION OF THE COURT

Before considering the merits of this cause, it is incumbent on the Court to first address the jurisdictional issue.

[1] The Illegal Immigration and Reform and Immigrant and Responsibility Act of 1996 ("IIRIRA"), Pub.L. No. 104-208, 110 Stat. 3009, signed into law by President Clinton *1016 on September 30, 1996, entirely redefined the scope and/or availability of judicial review of immigration orders and decisions. Section 306 of the IIRIRA rewrote 8 U.S.C. § 1252 (§ 242 of the Immigration and Nationality Act) and provides limits on judicial review of immigration matters. Section 242(g) of the Immigration and Nationality Act ("INA"), as amended by IIRIRA, provides as follows:

> (g) EXCLUSIVE JURISDICTION. Except as provided in this section and notwithstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under [the Immigration and Nationality Act ("INA")].

See IIRIRA § 306. Most of the amendments to the INA made pursuant to the IIRIRA do not effect habeas corpus petitions filed prior to the effective date of April 1, 1997. Section 1252(g), however applies retroactively, "without limitation to claims arising from all past, pending or future exclusion, deportation or removal proceedings." Dorean Vayspitter v. United States General Attorney, 1997 WL 299372, *3 (E.D.La. June 3, 1997); IIRIRA section 306, as amended October 11, 1996 Pub.L. No. 104-302, 110 Stat. 3656, 3657.

Because of Section 1252(g), the Government contends that under the clear terms of § 242(g) of the INA, as amended by the IIRIRA, this Court lacks jurisdiction to entertain the petitioner's claims. In support of their contention, the government cites two recent decisions, Yang v. I.N.S., 109 F.3d 1185 (7th Cir.1997) and Safarian v. Reno, 968 F.Supp. 1101 (E.D.La. 1997). In Yang, the Seventh Circuit held that under § 242(g) the district courts are precluded from exercising jurisdiction over deportation-related matters pursuant to 28 U.S.C. § 2241 or any other provision of law. In so holding, the Yang court emphasized that, "Congress wanted to expedite the removal of criminal aliens from the United States by eliminating judicial review, not to delay removal by requiring aliens to start the review process in the district court rather than the court of appeals." Yang, 109 F.3d at 1195. Next, the government cites Safarian, supra, in which the United States District Court for the Eastern District of Louisiana held that, "the express provisions of the IIRIRA clearly remove jurisdiction under any statute, including a right to habeas corpus under § 2241." According to the Government, only by divesting the federal courts of the power to review agency decisions through the writ of habeas corpus will the "streamlined appeal and removal process" intended by Congress be achieved. H.Rep. No. 104-469(I), 104th Cong., 2d Sess. 359, 463 (1996) (reproduced at 1996 WL 168955).

In his supplemental memorandum on jurisdiction the petitioner argues that this Court has the power to review through the writ of habeas corpus. Despite the enactment of the IIRIRA, the petitioner maintains that this Court retains habeas corpus jurisdiction under 28 U.S.C. § 2241 or Art. I, § 9, cl. 2 of the Constitution. The petitioner contends that this Court has habeas jurisdiction under 28 U.S.C. § 2241 because § 242(g) of the INA, as amended by the IIRIRA, does not effectively eliminate this habeas review. In the alternative, the petitioner contends that even if the IIRIRA validly eliminates the federal courts' habeas review under 28 U.S.C. § 2241, review is nevertheless available

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under the constitutional writ, unaided by statute.

A. History of Habeas Corpus

It is appropriate at this point to review the historical development of habeas corpus. The history of the right of personal liberty began before the writ of habeas corpus originated. The right was granted, at least to some English subjects, by Article 39 of Magna Carta, which provided that no free man should be arrested, imprisoned, or destroyed except by the judgment of his peers or by the law of the land. Magna Carta, Art. 39. The essence of this article has been traced back through English law books of the Twelfth Century to documents of the Holy Roman Empire of the Eleventh Century. Richard L. Perry and John C. Cooper, Sources of Our Liberties, p. 5 (1978). Although there has been scholarly dispute on *1017 the subject, as early as the Fourteenth Century the "law of the land" provision was considered to be the equivalent of "due process of law". Richard L. Perry and John C. Cooper, Sources of Our Liberties, p. 189 (1978); William S. Hollsworth, A History of English Law, 4th ed., Vol. 1, pp. 60-63 (1931). In addition, the protection of this provision was extended to all citizens and not just to the "freemen" who were a limited group of land barons. William S. Holdsworth, A History of English Law, Vol. 1, p. 227 (4th ed. 1931); Ex Parte Yerger, 75 U.S.(8 Wall.) 85, 96, 19 L.Ed. 332 (1868).

In America the Colonist claimed the writ as one of the "rights of Englishmen" to which they were entitled under their charters and by reason of the common law. As a result, the privilege of the writ of habeas corpus was incorporated into the constitutions adopted by the states at the time of the American Revolution. See, e.g., Constitution of Pennsylvania, Art. IX (1776). Constitution of Maryland, Art. XXI (1776).

B. Habeas Corpus Protected by Constitution

Habeas corpus is referenced in the Constitution of the United States. Because the writ of habeas corpus plays such a central role in protecting individual liberty, the framers provided in Art. 1, § 9, cl. 2 of the Constitution that "the privilege of the Writ of Habeas Corpus shall not be suspended [except during times of rebellion]."

C. Habeas Jurisdiction Under Statute

In addition to the specific reference in the Constitution, the writ has also been granted by statute. The federal courts have had the power to grant writs of habeas corpus since enactment of the Judiciary Act of 1789. Act of Sept. 24, 1789, ch. 20, § 14, 1 Stat. 82 (the "1789 Act"). In 1867, Congress expanded the Supreme Court's statutory appellate jurisdiction while also expanding the power of the federal courts to issue writs of habeas corpus, permitting the issuance of such writs "in all cases where any person may be restrained of his or her liberty in violation of the Constitution, or any treaty or law of the United States." Yesil v. Reno, 958 F.Supp. 828, 1997 WL 86391 (S.D.N.Y. Feb. 27, 1997) (citing Act of Feb. 5, 1867, ch. 28, 14 Stat. 385 (the "1867 Act.")) The current version of the Habeas Act is found in 28 U.S.C.A. §§ 2241-2255.

[2] Section 2241 of Title 28 of the United States Code establishes federal courts' power to grant the writ of habeas corpus. It provides, in part, that:

> (a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district court and any circuit judge within their respective jurisdictions
> ....
> (c) The Writ of habeas corpus shall not extend to a prisoner unless--
> (1) He is in custody under the color or by color of the authority of the United States or
> ....
> (3) He is in custody in violation of the Constitution or laws or treaties of the United States
> ....

28 U.S.C. § 2241(a), (c)(1), (c)(3). Section 2241 is the direct descendant of Section 14 of the Judiciary Act of 1789 and the 1867 Act, which expanded the scope of the writ. See Act of Sept. 24, 1789, ch. 20, § 14, 1 Stat. 82; Act of Feb. 5, 1867, ch. 28, 14 Stat. 385. Under Section 2241 habeas corpus will lie to protect the fundamental liberties guaranteed under the Constitution. Benziane v. U.S., 960 F.Supp. 238 (D.Colo.1997).

The petitioner argues that his access to this judicial review should not be restricted because there is not sufficient "clear and convincing evidence" that the IIRIRA repeals the district court's habeas corpus review under 28 U.S.C. § 2241. His argument is based on the principle espoused by the Supreme

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Court in Abbott Labs. v. Gardner, 387 U.S. 136, 140-41, 87 S.Ct. 1507, 1510- 11, 18 L.Ed.2d 681 (1967). In Abbott Labs, the Supreme Court adopted a presumption of reviewability which it derived from the structure of the Administrative Procedure Act: "[T]he Administrative Procedure Act ... embodies the basic presumption of judicial review.... [*1018 O]nly upon a showing of 'clear and convincing evidence' of a contrary legislative intent should courts restrict access to judicial review."

Almost one-hundred thirty years ago, and again last year, the Supreme Court explicitly admonished that Congressional intent to repeal habeas jurisdiction must be express and that "[r]epeals by implication are not favored." Felker v. Turpin, 518 U.S. 651, ----, 116 S.Ct. 2333, 2338, 135 L.Ed.2d 827 (1996); see also Ex Parte Yerger, 75 U.S.(8 Wall.) 85, 105, 19 L.Ed. 332 (1868). In both Felker and Yerger the Court refused to read jurisdiction modifying statutes enacted by Congress as repealing other avenues of habeas jurisdiction that had not been specifically abrogated, much less mentioned, by those jurisdiction modifying statutes. "Only upon a clear statement can a court conclude that Congress meant to repeal an independent avenue of habeas jurisdiction." Mojica v. Reno, 970 F.Supp. 130 (E.D.N.Y.1997). Such a clear statement is absent from the governing statute in the present case.

The Government points to the phrase "notwithstanding any other provision of law, no court shall have jurisdiction..." In § 242(g) of the INA, as amended by IIRIRA, as evidence that Congress intended to eliminate the district courts' recognized jurisdiction under 28 U.S.C. § 2241. They assert that this is "clear and convincing evidence" that Congress repealed the district courts' power to hear habeas corpus claims of any person in custody, including deportable aliens.

On this point the Court finds helpful the reasoning of the District Court for the District of Columbia in Ozoanya v. Reno, 968 F.Supp. 1 (D.D.C.1997), a case addressing the issue of whether 28 U.S.C. § 2241 remains a viable basis for habeas jurisdiction after the enactment of the IIRIRA. In Ozoanya, the United States District Court for the District of Columbia held that, the district courts jurisdiction to hear claims brought by deportable aliens under 28 U.S.C. § 2241 survives the 1996 amendments to the INA. In so holding the court stated:

> It follows from Felker that if Congress had intended to eliminate the district courts' jurisdiction under 28 U.S.C. § 2241 to consider habeas corpus petitions filed by a certain class of persons in custody, it would have had to do so affirmatively and clearly. There is nothing in the language of ... the IIRIRA to suggest that Congress expressly repealed Section 2241, limited its scope or eliminated the jurisdiction of the district courts under that statute to consider petitions for writs of habeas corpus....
> The language of ... the IIRIRA is "at best ambiguous" it "[does] not state that they repeal or amend section 2241; indeed they do not mention section 2241 at all." Yesil v. Reno, 958 F.Supp. 828, 838 (S.D.N.Y.1997).

Ozoanya, 968 F.Supp. At 6-7.

In Mojica v. Reno, supra, the United States District Court for the Eastern District of New York also found that the general habeas statute at 28 U.S.C. § 2241 continues to provide a jurisdictional basis for relief from deportation orders. Mojica, 970 F.Supp. 130 (E.D.N.Y.1997). In an opinion that supplements Ozoanya, the Mojica court stated:

> Congress is expert in the process of lawmaking. Had it desired to repeal section 2241, or render it inapplicable to challenges to deportation orders, it would have taken the necessary steps to do so. It must be presumed that Congress was mindful of the necessity for a clear statement to that effect. Congress is presumed to know the law. As the Felker Court acknowledged, Congress knows how to repeal habeas jurisdiction. Where it intended to do so, it states that intention expressly. See, Felker v. Turpin, 518 U.S. 651, —, 116 S.Ct. 2333, 2338, 135 L.Ed.2d 827 (1996).

Mojica, 970 F.Supp. at 160 (citations omitted).

The Mojica court also referred to findings relating to the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub.L. No. 104-132, 110 Stat. 1214 (1996), the statutory predecessor to the IIRIRA. The AEDPA, like IIRIRA, also contained a section which attempted to withdraw habeas corpus *1019 jurisdiction by all courts. Like the IIRIRA, the AEDPA did not expressly purport to modify section 2241. Yesil, 958 F.Supp. 828 (S.D.N.Y.). The Mojica Court, to provide further support for their holding, pointed out that district courts addressing the AEDPA's effect on § 2241

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"have been almost unanimous in their agreement that § 2241 is available and has not been repealed." Mojica, 970 F.Supp. At 161, [citing Yesil, 958 F.Supp. 828 (S.D.N.Y.1997); Eltayeb v. Ingham, 950 F.Supp. 95 (S.D.N.Y.1997); Duldulao v. Reno, 958 F.Supp. 476 (D.Haw.1997); Dunkley v. Perryman, 1996 WL 464191 (N.D.Ill.1996); Mbiya v. INS, 930 F.Supp. 609 (N.D.Ga.1996)]. Essentially, all these courts found that § 2241 was still available despite the enactment of the AEDPA, because the latter did not expressly repeal § 2241. Because the AEDPA and the IIRIRA basically contained the same jurisdictional withdrawal provision, the Court in Mojica utilized this logic in analyzing the effect of IIRIRA on § 2241 jurisdiction. By doing so it came to the conclusion stated earlier that, in the wake of the IIRIRA, section 2241 remains a viable basis for habeas jurisdiction. Mojica, 970 F.Supp. At 159-163.

[3] This Court agrees with the reasoning of both the Ozoanya and Mojica courts. Because the IIRIRA does not amend, or even mention, section 2241 of Title 28, the Court cannot conclude that Congress repealed § 2241 by implication. In order to have effectively repealed this statute Congress would have had to say so explicitly. It must be remembered that "[c]ourts do not have to resort to divining phantom or unarticulated Congressional intentions to repeal habeas jurisdiction from the void of statutory silence." Mojica, 970 F.Supp. at 160. Furthermore, if the Court were to find that the statute was repealed, the Court arguably would be violating the Suspension Clause of the Constitution. See Art. I, § 9, cl. 2; Mbiya, 930 F.Supp. at 612 ("Any attempt by Congress to restrict this sphere of authority necessarily would create constitutional difficulties not only with respect to the Suspension Clause, but also with respect to the Constitution's delineation of authority between the branches of the government").

D. Continued Viability of Habeas Corpus

In summary, from a historical and jurisprudential perspective, it is clear that the great writ still has vitality and that this court has jurisdiction. The suggestion that the IIRIRA bars all habeas corpus review must be rejected. See Yang v. INS, 109 F.3d 1185, 1194-97 (7th Cir.1997); Boston-Bollers v. INS, 106 F.3d 352, 355 (11th Cir.1997); Williams v. Immigration & Naturalization Service, 114 F.3d 82, 84 (5th Cir.1997). In the present case, however, it is necessary to explore whether this petitioner, a non citizen legal alien, fits within the scope of this concept.

III.
Scope of Habeas Review

[4] "Habeas Corpus review under § 2241 [or as contemplated by art. 1, section 9 of the Constitution] is justified if an alien subject to an order of deportation based on violation of crimes enumerated by Congress demonstrates some grave constitutional error or a fundamental miscarriage of justice." Mbiya, 930 F.Supp. 609, 612 (N.D.Ga.1996); See also, Yesil, 958 F.Supp. 828 (S.D.N.Y.1997); Eltayeb, 950 F.Supp. 95 (S.D.N.Y.1997). With the enactment of the IIRIRA, Congress evidenced its desire to expedite the deportation of criminal aliens and to restrict all judicial review of final orders of deportation to the greatest extent possible. Thus, in determining the scope of habeas review, courts have concluded that review should be limited to those situations in which deportation would result in a fundamental miscarriage of justice. Id. The rationale for this narrow scope of review is that it "is necessary to accommodate the balance between an alien's constitutional right to habeas review and Congress' power over matters of immigration." Eltayeb, 950 F.Supp. at 99. Hence a court should grant relief to the petitioner only if he demonstrates some grave constitutional error or a fundamental miscarriage of justice. Accordingly, the Court will analyze the petitioner's claims under this narrow standard of review.

*1020 A. Procedural Due Process Claims–Deportation Hearing

The Court will first address the petitioner's claim that his deportation hearing was in violation of his right to due process. Specifically, the petitioner claims that the deportation hearing violated procedural due process and fundamental fairness because the petitioner never made a knowing waiver of his constitutional rights. The petitioner contends that because he was never told by the Immigration Judge that he could be detained for an indefinite period of time as a result of the deportation hearing, he waived several important rights and made a number of significant admissions, such as electing not to obtain an attorney and admitting he was a

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German citizen. He also contends that he was never told by the Immigration Judge that his relatives' interest would be one of the principal determining factors in the outcome of the case. Furthermore, he was never asked by the Immigration Judge if he could obtain affidavits from his relatives expressing their interest. Accordingly, the petitioner contends that his right to call such witnesses and produce affidavits was waived unknowingly.

Aliens within this country who face expulsion are entitled to the procedural safeguards of due process. As the Supreme Court has held, "once an alien gains admission to a country and begins to develop the ties that go with permanent residence his constitutional status changes accordingly." Landon v. Plasencia, 459 U.S. 21, 32-33, 103 S.Ct. 321, 329, 74 L.Ed.2d 21 (1982). "The Supreme Court has frequently suggested that a continuously present alien is entitled to a fair hearing when threatened with deportation, and, has developed the rule that a continuously present permanent resident alien has a right to due process in such a situation." Id.

[5][6] The Due Process Clause of the Fifth Amendment provides that "[n]o person ... shall be deprived of life, liberty, or property without due process of law...." It protects individuals against two types of government action. "Substantive Due Process" prevents the government from engaging in conduct that "shocks the conscience," [FN3] or interferes with rights "implicit in the concept of ordered liberty." Palko v. Connecticut, 302 U.S. 319, 325-26, 58 S.Ct. 149, 152, 82 L.Ed. 288 (1937). "Procedural Due Process" ensures that government action depriving a person of life, liberty, or property is implemented in a fair manner. Mathews v. Eldridge, 424 U.S. 319, 335, 96 S.Ct. 893, 903, 47 L.Ed.2d 18 (1976).

FN3. Rochin v. California, 342 U.S. 165, 172, 72 S.Ct. 205, 209, 96 L.Ed. 183 (1952).

[7][8] As stated above, "the Fifth Amendment entitles aliens to due process of law in deportation proceedings." Reno v. Flores, 507 U.S. 292, 306, 113 S.Ct. 1439, 1449, 123 L.Ed.2d 1 (1993). Accordingly, the Immigration Judge must conduct deportation hearings in accord with the standards of due process. Olabanji v. I.N.S., 973 F.2d 1232, 1234 (5th Cir.1992). If the deportation hearings are not conducted properly, a due process violation exists when the defect impinges "upon the fundamental fairness of the hearing in violation of the Fifth Amendment, and there existed substantial prejudice." Ogbemudia v. I.N.S., 988 F.2d 595, 598 (5th Cir.1993).

1. Petitioner's waiver of right to counsel

[9] Although Congress has provided by statute that an alien has a right to obtain counsel at his own expense, an alien does not have a Sixth Amendment right to counsel in an immigration proceeding. Thus, "any right an alien may have in this regard is grounded in the fifth amendment guarantee of due process rather than the sixth amendment right to counsel." Barthold v. U.S. Immigration and Naturalization Service, 517 F.2d 689 (5th Cir.1975).

[10][11][12] Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), established the "totality of circumstances approach" for reviewing waiver of Fifth Amendment rights. In order for a waiver of right to counsel to be valid it must be made knowingly and intelligently. Molignaro v. Smith, 408 F.2d 795 (5th Cir.1969). Thus if petitioner's waiver of counsel was not made knowingly or intelligently, then the Immigration Judge's acceptance of it could constitute *1021 a due process violation if it impinged "upon the fundamental fairness of the hearing in violation of the Fifth Amendment" and resulted in substantial prejudice. Ogbemudia, 988 F.2d at 599. The determination of whether a waiver of the right to counsel has been made knowingly and intelligently depends upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused. Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461 (1938).

[13] The petitioner likens his waiver of rights in the administrative hearing to those waived by a criminal defendant in a guilty plea. The test for determining the validity of a guilty plea is "whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." Hill v. Lockhart, 474 U.S. 52, 56, 106 S.Ct. 366, 369, 88 L.Ed.2d 203 (1985). The petitioner contends that he did not knowingly waive his right to counsel at the deportation hearing because the Immigration Judge did not inform him

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that a result of the hearing could be prolonged detention. After review and study of the administrative record, the United States Magistrate Judge found that the petitioner, despite the claimed defect, knowingly and intelligently waived his right to counsel. This Court agrees.

[14] Having reviewed the record in light of the "totality of the circumstances," the Court is convinced that the petitioner's waiver of counsel during the deportation hearing was constitutionally valid and that there was no fundamental unfairness in the Immigration Judge's acceptance of this waiver. Therefore, the petitioner was not deprived of due process. First, the petitioner should have known about the value of counsel in legal proceedings due to his extensive first hand knowledge of the criminal justice system. Secondly, he was specifically told that he had a right to counsel and was advised about the ramifications and possible consequences of his admissions. This factor alone is sufficient to support a finding that there was not a denial of due process. Barthold, 517 F.2d 689 (5th Cir.1975).

[15][16][17] The Court does not agree with the petitioner that the Immigration Judge had a duty to inform him, that if found deportable he could be detained while awaiting deportation. The nature of a deportation hearing is civil in nature. Ramirez-Osorio v. I.N.S., 745 F.2d 937 (5th Cir.1984). "Consistent with the civil nature of the proceeding, various protections that apply in the context of a criminal trial do not apply in a deportation." INS v. Lopez-Mendoza, 468 U.S. 1032, 104 S.Ct. 3479, 82 L.Ed.2d 778 (1984). Thus, a waiver of counsel in a deportation hearing need not be "made with an apprehension of ... the range of allowable punishments thereunder, ... and all other facts essential to a broad understanding of the matter." Von Moltke v. Gillies, 332 U.S. 708, 724, 68 S.Ct. 316, 323, 92 L.Ed. 309 (1948). In short, the petitioner has failed to present any authority for his argument that an Immigration Judge in a deportation proceeding must inform the alien of all the possible consequences that might result from a finding of deportability. Accordingly, the Court finds the fact the Immigration Judge failed to inform the petitioner of the possibility of prolonged detention did not alter the fact that the waiver of counsel was made knowingly. Hence, the deportation hearing was conducted in accordance with the requirements of due process and fundamental fairness.

2. Petitioner's lack of affidavits and admissions that he was a Citizen of Germany

The second prong of the petitioner's due process claim, is that his lack of attorney prejudiced him at the deportation hearing. As such the petitioner believes that the deportation hearing was unfair and did not comport with the requisites of procedural due process. Specifically, the petitioner contends that the lack of affidavits from his relatives and his conclusion that he was a German citizen interfered with his chance to obtain Section 212(c) relief of the Immigration Act. Accordingly, the petitioner contends that his right to due process of the law was violated.

[18][19] Under Section 212(c) of the Immigration and Nationality Act, aliens admired *1022 for permanent residence who have maintained a lawful unrelinquished domicile in the United States for seven consecutive years, may in the Attorney General's discretion, be permitted to continue residing in the United States notwithstanding their deportability under other sections of the Act. Ashby v. I.N.S., 961 F.2d 555 (5th Cir.1992). Section 212(c) does not provide an indiscriminate waiver for all who demonstrate statutory eligibility for such relief. Id. Rather, the petitioner bears the burden of demonstrating that his request for a waiver warranted favorable consideration. Further, "because section 212(c) does not provide standards governing how the Board's discretion should be exercised, the Attorney General has unusually broad discretion in granting and denying waivers." Id.

[20] In order to provide the framework for an equitable application of discretionary relief, the Board has enunciated factors relevant to the issue of whether § 212(c) relief should be granted as a matter of discretion:

> Among the factors deemed adverse to a respondent's application have been the nature and underlying circumstances of the exclusion ground at issue, the presence of additional significant violations of this country's laws, the existence of a criminal record and, if so, its nature, recency, and seriousness, and the presence of other evidence indicative of a respondent's bad character or undesirability as permanent resident of this country.

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Matter of Marin, 16 I & N Dec. 581, 584-85 (BIA 1978). The decision to grant § 212(c) relief is within the sole discretion of the Immigration Judge.

The AEDPA and the IIRIRA both evidence Congress' intent to preclude from review those matters particular to the agency's discretion and expertise--i.e., matters involved in determinations of deportability. Anwar v. I.N.S., 107 F.3d 339, 342 (5th Cir.1997). The petitioner, however, does not ask this Court to review the decision of the Immigration Judge to deny discretionary relief. Rather, the petitioner is seeking review of certain procedural aspects of the hearing at which the Immigration Judge decided not to grant discretionary relief under § 212(c). Accordingly, the petitioner's challenges are reviewable by this Court for the purpose of determining whether the hearing was conducted in accordance with due process.

a. Lack of Affidavits

The petitioner's alleged due process violation is that he was never told that he, pursuant to § 212(c), could provide affidavits at the hearing in support of his application for § 212(c) relief. Accordingly, the petitioner contends that this defect rendered the hearing unfair and that he was substantially prejudiced thereby. The Board of Immigration Appeals has set forth several "favorable considerations" on which the alien may "present [ ] evidence in support of a favorable exercise of discretion" under § 212(c):

> Favorable considerations have been found to include such factors as family ties within the United States, residence of long duration in this country ..., evidence of hardship to the respondent and family if deportation occurs, ..., a history of employment, the existence of property or business ties, evidence of value and service to the community, proof of genuine rehabilitation if a criminal record exists, and other evidence attesting to a respondent's good character (e.g., affidavits from family, friends, and responsible community representatives).

Matter of Marin, 16 I & N Dec. at 584-85 (citation omitted). The petitioner argues that his right to due process of the law was violated by the Immigration Judge failing to inform him that he could provide affidavits and then basing the decision to deny § 212(c) relief on a lack of such affidavits.

[21][22][23] The Court finds that the petitioner's lack of affidavits did not "impinge upon the fundamental fairness of the hearing in violation of the Fifth Amendment," or substantially prejudice the petitioner. Ogbemudia, 988 F.2d at 595 (5th Cir.1993). First, a due process challenge requires a showing of substantial prejudice to the petitioning alien. Hernandez-Garza v. INS, 882 F.2d 945 (5th Cir.1989). Also, "to render a hearing unfair, the defect or practice complained of must have been such as might have led to a denial *1023 of justice, or there must have been absent an element deemed essential to due process." Animashaun v. Immigration and Naturalization Service, 990 F.2d 234, 238 (5th Cir.1993).

The petitioner, however, contends that his due process rights were violated because the Immigration Judge made the lack of affidavits a key factor in deciding whether to grant § 212(c) relief. Essentially the petitioner contends that had he been informed of his right to provide affidavits from his relatives indicating they would suffer emotional hardship if he were deported, he would have done so. According to the petitioner, these affidavits would have persuaded the Immigration Judge to grant relief under § 212(c). Thus, the petitioner contends that he was substantially prejudiced by his lack of affidavits. The Court disagrees.

The Immigration Judge, despite the lack of affidavits outlining hardship, assumed that deportation would adversely effect the petitioner and his relatives. He then "balance[d] the adverse factors evidencing an alien's undesirability as a permanent resident with the social and humane considerations presented in his behalf to determine whether granting section 212(c) relief appear[ed] in the best interests of this country." Matter of Marin, 16 I & N Dec. at 584-85. Balancing these factors, the Immigration Judge found that the extreme hardship the petitioner and his family would suffer if he was deported was one of the most positive equities weighing in his favor. The effect that the petitioner alleges the affidavits would have had on the deportation hearing was achieved when the Immigration Judge assumed that the deportation would cause extreme hardship. Thus, the lack of affidavits did not prejudice the petitioner.

[24] Moreover, the court finds no fundamental unfairness in the deportation hearing because the petitioner cannot point to anything in § 212(c) that required the Immigration Judge to inform him of his right to submit affidavits from relatives. Had the petitioner retained counsel, it would have been the obligation of the attorney to inform him of this right. However, the Immigration Judge was not the petitioner's counsel. Thus, the Immigration Judge's failure to inform the petitioner of his right to submit affidavits from relatives did not lead to a denial of justice. Hence, the petitioner's original deportation hearing was fair and comported with the requisites of due process.

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b. Petitioner's Admission that he was a German Citizen

The petitioner also contends that the immigration judge mistakenly believed he was a German citizen. According to petitioner, had the Immigration Judge realized he had no country that would claim him as a citizen, the Immigration Judge would have granted him relief under § 212(c). Thus, he contends that the deportation hearing was constitutionally flawed. The Court disagrees.

The Immigration Judge did not deny § 212(c) relief simply because he believed that the petitioner was a German citizen. Section 212(c) relief was denied because of the petitioner's past criminal history and his prior episode of "bond jumping." The fact that the petitioner claimed he was a German citizen played only an insignificant part, if any, in the Immigration Judge's decision to deny § 212(c) relief. On page 14 of his Motion and Incorporated Memorandum to Review the Magistrate's Report and Recommendation, the petitioner even admits that the conclusion was innocuous. Accordingly, this Court finds that the Immigration Judge's finding as to the petitioner's citizenship did not substantially prejudice the petitioner, or render his hearing fundamentally unfair.

B. Substantive Due Process Claim--Detention pending Deportation

The petitioner claims that his continued detention pending deportation violates his Fifth Amendment right to substantive due process. In arguing that the length of his detention (a denial of petitioner's asserted liberty interest) "shocks the conscience," the petitioner focuses on the substantive nature of the alleged constitutional violation.

Narrowly framed, the issue before this Court is whether a legal alien who is under a final order of deportation may be permanently *1024 incarcerated because the INS cannot find a country to take him. The Court must determine whether such detention is beyond permissible constitutional limitations. Tran v. Caplinger, 847 F.Supp. 469 (W.D.La.1993).

1. Statutory Authority

[25][26] It is necessary to note that control over matters of immigration and naturalization is the "inherent and inalienable right of every sovereign and independent nation." Fong Yue Ting v. U.S., 149 U.S. 698, 711, 13 S.Ct. 1016, 1021, 37 L.Ed. 905 (1893). Under the United States Constitution, such control is vested in the political branches of government. See U.S. Const., art. 1, § 8, cl.4. Congressional power in their area is plenary, subject to only limited judicial review. See Fiallo v. Bell, 430 U.S. 787, 97 S.Ct. 1473, 52 L.Ed.2d 50 (1977). In exercising its broad power over immigration and naturalization, "Congress regularly makes rules that would be unacceptable if applied to citizens." Mathews, 426 U.S. at 80, 96 S.Ct. at 1891. Nonetheless, aliens both legal and illegal, are entitled to the constitutional protection of due process, equal protection and reasonable bail. Id. Also, legal aliens subject to deportation--the category in which petitioner falls-- generally are granted greater substantive rights than are excludable aliens. Landon, 459 U.S. at 26-27, 103 S.Ct. at 325-26. With this in mind, the Court will review the petitioner's detention to determine whether it is violative of his substantive due process rights.

At the outset, the Court notes that petitioner is properly classified as a convicted aggravated felon because of his controlled substance violation. True, the petitioner has served his sentence and hence paid his debt to society, but that fact does not alter this status. See, 8 U.S.C. § 1101(a)(43). Petitioner does not challenge this finding.

The INA authorizes the Attorney General on behalf of the INS to take an alien into custody pending deportation. See generally, 8 U.S.C. § 1252. Section 1252(a)(2)(A) of the Act specifically provides for the detention of aggravated convicted felons, as follows:

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The Attorney General shall take into custody any alien convicted of an aggravated felony upon release of the alien (regardless of whether or not such release is on parole, supervised release, or probation, and regardless of the possibility of rearrest or further confinement in respect of the same offense). Notwithstanding paragraph (1) or subsections (c) and (d) but subject to subparagraph (B), the Attorney General shall not release such felon from custody.

Paragraph (B) then provides:

The Attorney General may not release from custody any lawfully admitted alien who has been convicted of an aggravated felony, either before or after a determination of deportability, unless the alien demonstrates to the satisfaction of the Attorney General that such alien is not a threat to the community and that the alien is likely to appear before any scheduled hearings.

Section 1252(a)(2) creates a rebuttable presumption against the release of any alien who is convicted of an aggravated felony. See Matter of Ellis, 1993 WL 65657 (BIA 1993). Detention is required by 8 U.S.C. § 1252(a)(2)(A) unless the alien can rebut the presumption by successfully meeting the burden of proof set forth in 8 U.S.C. § 1252(a)(2)(B). Deportable aliens, convicted of aggravated felonies, who are lawfully admitted have an opportunity to overcome the presumption against their release by presenting favorable evidence to an Immigration Judge in an individual bond hearing. In order to be eligible for release, an alien convicted of an aggravated felony must show that he is lawfully admitted, that he is not a threat to the community, and that he is likely to appear at any scheduled hearings. 8 U.S.C. § 1252(a)(2)(B).

In this case, petitioner has established that he was lawfully admitted to this country; as to the other two requirements, however, petitioner has not met his burden of proof. Considering petitioner's recidivist history and his prior episode of "bond jumping," petitioner has not met his burden of proving that he is not a threat to the community and that he is likely to appear for scheduled hearings. [FN4]

FN4. The petitioner has received a discretionary bond redetermination based entirely on the recent enactment and invocation of the superseding Transitional Custody Rules of the IIRIRA. The Transition Period Custody Rules replaced the amendments made by section 440(c) of the AEDPA. Aliens who, like the petitioner, are deportable for having been convicted of an aggravated felony or a controlled substance violation may be released if:

"(I) the alien was lawfully admitted to the United States and satisfies the Attorney General that the alien will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding."

See Section 303(b)(3)(B) of the IIRIRA. Consequently, in compliance with the Transitional Custody Rules, INS has interviewed the petitioner and has reviewed his file. Again, the INS has decided not to release the petitioner because he has not met his burden of proving that he is not a threat to the community and that he is likely to appear for scheduled hearings.

*1025 According to the language of 8 U.S.C. § 1252(a)(2)(A) detention is clearly mandated for aggravated felons who have not overcome the presumption against their release. See 8 U.S.C. § 1252. The language of 8 U.S.C. § 1252(a)(2)(B) and the Transitional Custody rules of the IIRIRA also contain language which supports mandatory detention. Additionally, nowhere in the relevant statute does Congress place a time limit on the detention. In Tran v. Caplinger, 847 F.Supp. 469 (W.D.La.1993), the District Court for the Western District of Louisiana stated:

> Congress has made provisions for expediting deportation proceedings of aliens who are convicted of committing aggravated felonies. See 8 U.S.C. § 1252(a). However despite efforts to expeditiously deport aggravated felons, there are times when circumstances beyond the control of the Attorney General and her agents make immediate deportation impracticable, unadvisable, or impossible. When such delays occur, Congress has not expressly limited the power of the Attorney General to detain such aliens. Neither section 1252(a)(2) nor section 1252(a) places a time limit upon the period of detention. Clearly, Congress knows how to place time limits upon the period of detention if they had chosen to do so. See 8 U.S.C. § 1252(c).

[27] Consequently, the mandatory language and the absence of a time limit on detention leads this Court to conclude that "indefinite detention of deportable aliens who are aggravated felons is statutorily authorized when immediate deportation is not possible and the alien has not overcome the presumption against his release." Tran, 847 F.Supp. at 474. See, also, Palma v. Verdeyen, 676 F.2d 100 (4th Cir.1982); Gisbert v. U.S. Atty. Gen., 988 F.2d 1437 (5th Cir.1993).

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2. Constitutional Challenge

This Court agrees with the Court in Tran, that "[w]hile there is statutory authority allowing indefinite detention of an alien who is classified as an aggravated felon under immigration law where the alien is unable to overcome the presumption which is established by 8 U.S.C. § 1252(a)(2), it is unclear how long this detention can continue without becoming violative of an alien's constitutional rights." Thus, "it is necessary for this Court to analyze the Petitioner's detention in light of his constitutional challenge to determine whether Petitioner's detention has continued beyond permissible constitutional limitations." Id.

[28] At the outset this Court again notes that the Fifth Amendment's mandate that "no person shall ... be deprived of life, liberty, or property, without due process of law" extends due process protection to persons within the territorial United States and not just to U.S. citizens. See Plyler v. Doe, 457 U.S. 202, 210-12, 102 S.Ct. 2382, 2391-92, 72 L.Ed.2d 786 (1982); Wong Wing v. United States, 163 U.S. 228, 16 S.Ct. 977, 41 L.Ed. 140 (1896). Thus, the petitioner is entitled to have his detention reviewed by this Court to make sure it comports with the notions of due process.

The constitutionality of the detention must be considered in light of its purpose. The Fifth Circuit has indicated that the focus must be on "whether the detention is imposed for the purpose of punishment or whether it is merely incidental to another legitimate governmental purpose." Gisbert v. United States Attorney General, 988 F.2d 1437, 1441 (5th Cir.1993), citing Schall v. Martin, 467 U.S. 253, 268-69, 104 S.Ct. 2403, 2412, 81 L.Ed.2d 207 (1984). Absent "any expression of intent to punish on the part of *1026 the government, that determination will generally turn on 'whether an alternative purpose to which [the detention] may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned [to it].' " Id. at 1441-42, citing Schall, 467 U.S. at 268-69, 104 S.Ct. at 2411-12.

The legislative history and text of Section 1252 clearly shows that Congress did not contemplate permanent detention as a means of punishment for aliens convicted of aggravated felonies who have already served their sentence. Tran, 847 F.Supp. at 474. Section 1252(a)(2)(B) of the INA and § 303(b)(3)(B) of the IIRIRA provides for the release of a lawfully admitted alien who has been convicted of an aggravated felony where the alien has demonstrated that he is neither a threat to others nor a flight risk. Thus, the purpose behind detention of these aliens is to protect the community from aggravated felons and to prevent aliens from absconding before deportation can be accomplished. Id., Caballero v. Caplinger, 914 F.Supp. 1374 (E.D.La.1996). Accordingly, the question of whether petitioner's detention complies with substantive due process ultimately turns on whether the detention in petitioner's case is excessive in relation to these goals.

The court in Tran determined that continued detention of a non-excludable alien under § 1252 pending deportation is not an excessive means of accomplishing the government's purpose. Tran, 847 F.Supp. 469. The Tran court recognized the heightened interest of Congress in immigration matters and noted that the INS had limited application of § 1252(a)(2) detention to those aliens who have already been judicially determined to have committed a felony. Id. at 475. The Court also notes that in Gisbert the Fifth Circuit using essentially the same rationale as the court in Tran found that the continued detention of an excludable alien pending deportation was not an excessive means of accomplishing the purposes sought to be served by § 1252(a). See also Caballero, 914 F.Supp. at 1374.

It is clear that protecting the community from aggravated felons and preventing aliens from absconding before deportation are legitimate governmental policy goals that, "can warrant a deprivation of liberty under the proper circumstances." U.S. v. Salerno, 481 U.S. 739, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987).

[29] The particularly troublesome aspect of the petitioner's detention is its duration to date and its potential, if not certainty, for indefinite duration in the future. Detention is intended for the sole purpose of effecting deportation, and once it becomes evident that deportation is not realizable in

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the future, the continued detention of the alien loses its raison d'etre. If there is nowhere to send the alien, then indefinite detention is no longer a temporary measure in the process of deportation; it is permanent confinement. "Detention pending deportation seems properly analogized to incarceration pending trial or other disposition of a criminal charge, and is, thus justifiable only as a temporary measure." Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382 (10th Cir.1981).

Federal circuit and district courts have long held that deportable aliens in custody for more than a few months must be released because such detention becomes imprisonment. For example, in Petition of Brooks, 5 F.2d 238, 239 (D.Mass.1925) the court declared:

"The right to arrest and to hold or imprison an alien is nothing but a necessary incident of the right to exclude or deport. There is no power in this court or in any other tribunal in this country to hold indefinitely any sane citizen or alien in imprisonment, except as punishment for a crime. Slavery was abolished by the Thirteenth Amendment. It is elementary that deportation or exclusion proceedings are not punishment for a crime.... He is entitled to be deported or to have his freedom."

and, in United States ex rel. Ross v. Wallis, 279 F. 401, 403-04 (2d Cir.1922), the court stated:

"... we therefore express an opinion that unless this relator, or any other person similarly situated, be actually deported within four months after such alien has exhausted his legal remedies, any further *1027 or other detention under pretense of awaiting opportunity would amount, and will amount, to an unlawful imprisonment, from which relief may be affected by a new habeas corpus."

Thus, courts have not hesitated to condemn the detention of an alien whenever it has appeared, following the lapse of a reasonable time, that his deportation was impossible or could not be effected in the foreseeable future. See U.S. ex rel. Kusman v. District Director of Immigration and Naturalization at Port of New York, 117 F.Supp. 541 (S.D.N.Y.1953); U.S. ex rel. Ross v. Wallis, 279 F. 401 (2d Cir.1922); Caranica v. Nagle, 28 F.2d 955 (9th Cir.1928); Wolck v. Weedin, 58 F.2d 928 (9th Cir.1932); In re Hanoff, 39 F.Supp. 169 (D.Cal.1941); U.S. ex rel. Janavaris v. Nicolls, 47 F.Supp. 201 (D.Mass.1942). The United States District Court for the District of Kansas stated that:

"The rationale underlying these decisions was that detention was intended for the sole purpose of effecting deportation. Once it has become evident that deportation was not realizable in the foreseeable future, the continued detention was found to be without cause."

Fernandez v. Wilkinson, 505 F.Supp. 787, 792 (D.Kan.1980). Courts have held that approximately two to four months was a reasonable period to detain an alien pending deportation efforts. Id. In the wake of these holdings, Congress enacted 8 U.S.C. § 1252(c), which gave the Attorney General six months in which to accomplish the aliens departure. [FN5] Although, the section has been repealed it does exhibit that at one point in time Congress disapproved of detention beyond the reasonable time necessary to execute a final order of deportation.

FN5. 8 U.S.C. § 1252(c) stated in pertinent part as follows:

Final Order of Deportation; place of detention.

When a final order of deportation under administrative processes is made against any alien, the Attorney General shall have a period of six months from the date of such order, or is judicial review is had, then from the date of the final order of the court within which to effect the alien's departure from the United States, during which period at the Attorney General's discretion, the alien may be detained, released on bond in an amount and containing such conditions as the Attorney General may prescribe, or released on such other conditions as the Attorney General may prescribe.

[30] Based upon the rationale above, this Court finds that the petitioner's detention of nearly four years with no end in sight, and the probability of permanent confinement, is an excessive means of accomplishing the purposes sought to be served by 8 U.S.C. § 1252(a). The inability of the INS to obtain travel documents for the petitioner within nearly four years troubles this Court. The United States has amicable relationships with Germany and Lithuania. Thus the INS cannot claim that uncertain status between the United States and any one of these countries is the reason for the inability to deport and imply that in due time the situation will or may change. The fact of the matter is that the petitioner is not now nor has he ever been a citizen of any country. To say that he is temporarily detained pending deportation is not accurate. The petitioner, a legal alien, will never be deported because there is no place to send him. This fact

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distinguishes this case from the other cases cited elsewhere in this opinion dealing with aliens awaiting deportation. The petitioner is reminiscent of E.E. Hale's novel, "Man Without A Country," except that his perpetual confinement is in a prison rather than on a ship. This result "shocks the conscience" of the Court. Accordingly, the Court finds that the petitioner's detention is violative of his constitutional rights to substantive due process. [FN6]

FN6. The petitioner makes two other arguments relating to his continued confinement pending deportation. The first of these contentions is that the petitioner's right to procedural due process was violated as to his continued confinement. The second contention is that the petitioner's incarceration violates the Eighth Amendment's prohibition against cruel and unusual punishment. However, because of this Court's ruling on substantive due process this Court need not address these claims.

IV.
CONCLUSION

For the foregoing reasons, IT IS ORDERED that the petitioner's application for *1028 writ of habeas corpus is HEREBY GRANTED.

IT IS FURTHER ORDERED that the petitioner, Kestutis Zadvydas, SHALL BE RELEASED from the custody of the INS upon conditions to be set by the Court at a hearing, which shall be held on Wednesday, November 12, 1997 at 9:00 a.m. in Room C-468.

IT IS FURTHER ORDERED that petitioner shall be released within 35 days from the date of such hearing.

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APPENDIX "B"

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sel's closing argument during the punishment phase that the shooting was accidental, are sufficient to demonstrate prejudice within the meaning of *Strickland*. Absent those inexcusable and unreasonable failures, there is a reasonable probability that the outcome of Moore's punishment phase would have been different. *Whitley*, 977 F.2d at 159; *Duhamel*, 955 F.2d at 965-66; *Wilkerson*, 950 F.2d at 1065; *Profitt*, 831 F.2d at 1249. We therefore conclude that trial counsel's cumulative errors rendered the result of Moore's punishment phase unreliable and affirm the district court's grant of relief as to punishment only.

VII.

The district court granted the writ of habeas corpus and ordered that the state court of conviction grant Moore a new trial on the issue of punishment only. On appeal, the Director argues that the district court exceeded its authority by ordering the state court to conduct a new punishment trial.

[27, 28] We agree. A federal habeas court has the power to grant a writ of habeas corpus. *Duhamel*, 955 F.2d at 968. The federal habeas court is without power, however, to order that the state conduct a new punishment hearing. *King*, 1 F.3d at 287. When relief in a capital case is limited to punishment only, as in this case, the proper course is to enter an order granting the writ, but permitting the state court of conviction a reasonable period of time in which to decide whether: (1) to hold a new trial on the issue of punishment only, as permitted by TEX.CODE CRIM. PROC. art. 44.29(c), or (2) to vacate the habeas petitioner's sentence and to impose a sentence less than death. *Granviel v. Estelle*, 655 F.2d 673 (5th Cir. Sept.1981); *Whitley*, 977 F.2d at 161; *Jones*, 788 F.2d at 1103. We therefore remand with instructions to enter such an order.

CONCLUSION

For the foregoing reasons, the district court's determination that Moore's trial counsel rendered constitutionally deficient performance which prejudiced the outcome of the punishment phase of Moore's capital trial is AFFIRMED as modified by this opinion. The cause is REMANDED to the district court with instructions to enter an order granting the writ of habeas corpus, but conditioning the issuance of that writ upon the passage of a reasonable but certain period of time during which the state court of conviction may cure the constitutional error by vacating Moore's death sentence and imposing a sentence less than death, or by conducting a new punishment hearing pursuant to Texas Code of Criminal Procedure art. 44.29(c).

Kestutis ZADVYDAS, Petitioner-Appellee,

v.

Lynne UNDERDOWN; U.S. Immigration and Naturalization Service, Respondents-Appellants.

No. 97-31345.

United States Court of Appeals, Fifth Circuit.

Aug. 11, 1999.

Resident alien sought habeas corpus relief, alleging that, since he was stateless and there was no possibility of his deportation to another country, his continued detention by Immigration and Naturalization Service (INS) following issuance of deportation order violated his due process rights. The United States District Court for the Eastern District of Louisiana, Eldon E. Fallon, J., 986 F.Supp. 1011, granted relief. INS appealed. The Court of Appeals, Garwood, Circuit Judge, held that

alien's continued detention did . .iolate his due process rights, given that reasonable procedures existed for his parole and periodic review of his detention, and possibilities of attaining citizenship in Lithuania, Germany, or Russia had not been exhausted.

Reversed.

1. Constitutional Law ⇐274.3

Long-term detention of excludable aliens pending deportation is allowable under due process clause. U.S.C.A. Const. Amend. 5.

2. Aliens ⇐53.9

Treaties ⇐8

Resident alien's continued detention by Immigration and Naturalization Service (INS), following his criminal convictions and deportation order, did not violate international treaties and customary international law proscriptions of arbitrary detention, notwithstanding his argument that he was stateless and that there was no possibility of his deportation to another country, inasmuch as his detention was not arbitrary.

3. Habeas Corpus ⇐521

Court of Appeals had jurisdiction to hear appeal of denial of habeas corpus petition filed by alien alleging that his continued detention by Immigration and Naturalization Service (INS) following deportation order violated his due process rights, inasmuch as decision to detain was not decision to execute removal order so as to be unreviewable by courts pursuant to Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), which was the strictest jurisdictional standard under which his claims could be evaluated. U.S.C.A. Const.Amend. 5; Immigration and Nationality Act, § 242(g), 8 U.S.C.A. § 1252(g); 28 U.S.C.A. § 2241.

4. Federal Courts ⇐542

Even though district court's jurisdiction was not contested on appeal after having been contested below, Court o. peals was required to examine its own jurisdiction independently of district court before proceeding.

5. Aliens ⇐39

Congress desires minimal judicial intrusion into deportation decisions.

6. Aliens ⇐40

Immigration and Naturalization Service (INS) acted reasonably in determining that alien's habeas corpus petition, alleging that his continued detention by Immigration and Naturalization Service (INS) following deportation order violated his due process rights, was governed by permanent provision of Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) authorizing detention but making it discretionary beyond 90-day period, not by earlier provisions of Anti-Terrorism and Effective Death-Penalty Act (AEDPA) requiring detention of all aliens awaiting deportation regardless of flight risk, where his deportation order had become final long before IIRIRA's effective date; Congress did not determine that aliens in custody prior to IIRIRA's effective date were, as a class, significantly more dangerous than those subsequently taken. U.S.C.A. Const.Amend. 5; Immigration and Nationality Act, § 241(a)(6), 242(a)(6), 8 U.S.C.A. § 1231(a)(6), 1252(a)(2); 28 U.S.C.A. § 2241.

7. Aliens ⇐40

Statutes ⇐219(6.1)

Retroactivity clause of Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), barring application of IIRIRA "in the case of an alien who is in exclusion or deportation proceedings before" IIRIRA's effective date, was ambiguous enough to merit consideration of *Chevron* principles regarding deferral to agency; natural reading would seem to be that IIRIRA applied only to proceedings pending as of effective date, but usage of "before" might be read to imply that it affected only those that were free of involve-

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9. Aliens ⇐18

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ment in deportation proceedings prior to effective date. U.S.C.A. Const.Amend. 5.

8. Aliens ⇐18

Exclusion of aliens is a fundamental act of national sovereignty that stems not alone from legislative power but is inherent in the executive power to control the foreign affairs of the nation.

9. Aliens ⇐18

Power to expel or exclude aliens is a fundamental sovereign attribute exercised by the government's political departments largely immune from judicial control.

10. Aliens ⇐39

Power of the national government to act in the immigration sphere is essentially plenary.

11. Aliens ⇐4

Aliens can claim some constitutional protections.

12. Constitutional Law ⇐252

Aliens within the territory of the United States may invoke due process clause, and this principle applies to both resident aliens and excludable aliens who have failed to effect unimpeded entry into the country. U.S.C.A. Const.Amend. 5.

13. Constitutional Law ⇐274.3

Because of their special position, certain classifications and restrictions that would be intolerable under due process clause if applied to citizens are allowable when applied to resident aliens. U.S.C.A. Const.Amend. 5.

14. Constitutional Law ⇐274.3

Because Fourteenth Amendment's limits on state powers are substantially different from the constitutional provisions applicable to the federal power over immigration and naturalization, provisions in state laws respecting aliens which would be invalid under the Fourteenth Amendment are not necessarily invalid under due process clause of Fifth Amendment when contained in federal legislation. U.S.C.A. Const.Amends. 5, 14.

15. Aliens ⇐53.9

Constitutional Law ⇐274.3

Continued detention of resident alien by Immigration and Naturalization Service (INS), following his criminal convictions and issuance of deportation order, did not violate his due process rights, notwithstanding his argument that, as person born in displaced persons camp in Germany of ethnically Lithuanian parents, he was stateless, and there was no possibility of his deportation to another country; reasonable procedures for parole and periodic review of his detention were in place, and it could not be said that he would never be deported, given that possibilities of attaining citizenship in Lithuania, Germany, or Russia had not been exhausted. U.S.C.A. Const.Amend. 5; 8 C.F.R. §§ 236.1(d)(2)(ii), (3)(iii), 241.4, 241.5.

16. Constitutional Law ⇐274.3

Under due process clause, resident aliens may not be subjected to detention amounting to punishment without trial. U.S.C.A. Const.Amend. 5.

17. Aliens ⇐53.9

That government for humanitarian or administrative reasons chooses to allow excludable aliens into the country while their cases are pending does not alter their status if they were initially properly detained at the border.

18. Constitutional Law ⇐274.3

Because attempt to enter United States is a request for a privilege rather than an assertion of right, denial of entry is not a deprivation of rights subject to procedural due process. U.S.C.A. Const. Amend. 5.

19. Constitutional Law ⇐70.1(7.1)

Because denial of entry is not a deprivation of rights subject to procedural due process, and because of judiciary's deference to the other governmental branches, judiciary must leave it to Congress to determine the procedures to be used in adju-

dicating such claims. U.S.C. Const. Amend. 5.

20. Aliens ⇐46
Constitutional Law ⇐274.3

Excludable aliens have no procedural due process rights with regard to their entry, and most of their substantive rights will be constrained by the government's need to control immigration. U.S.C.A. Const.Amend. 5.

21. Constitutional Law ⇐42.3(1)

To the extent that excludable aliens' substantive due process rights are infringed, either during the immigration process or while they are on parole subject to the entry fiction, in a manner that cannot be connected to the immigration power, they may assert such rights. U.S.C.A. Const. Amend. 5.

22. Constitutional Law ⇐274.3

Resident aliens, by virtue of their presence in the United States, develop an interest in remaining that, to a certain extent, entitles them to procedural due process before they may be removed from this country. U.S.C.A. Const.Amend. 5.

23. Constitutional Law ⇐274.3

Rights of resident aliens to procedural due process before being removed from United States extend to resident aliens seeking reentry after a brief trip abroad not meaningfully interruptive of aliens' continued United States residence. U.S.C.A. Const.Amend. 5.

24. Aliens ⇐39
Constitutional Law ⇐274.3

Fact that resident alien status entitles one to due process respecting the decision to deport does not mean that the concept of government's plenary power over aliens is extinguished; on the contrary, the needs of the government are taken into account in evaluating such claims and the standard for evaluating procedures is thus lower than would be expected in analyzing the rights of a citizen with a like interest. U.S.C.A. Const.Amend. 5.

25. Aliens ⇐39

Constitutional rights of resident aliens may be affected by government's plenary power over immigration.

26. Aliens ⇐39
Constitutional Law ⇐274.3

Both excludable and resident aliens have the due process right to be free of abuses that, while tangentially and remotely related to the immigration process, cannot be justified as in furtherance of immigration goals; however, both may come in conflict with the government's sovereignty interests, and when this occurs their rights are constrained accordingly and to the same extent. U.S.C.A. Const.Amend. 5.

27. Constitutional Law ⇐274.3

Under due process clause, government may detain a resident alien based on either danger to the community or risk of flight while good faith efforts to effectuate the alien's deportation continue and reasonable parole and periodic review procedures are in place. U.S.C.A. Const. Amend. 5.

Robert F. Barnard, New Orleans, La, for Petitioner-Appellee.

Emily Anne Radford, Civil Division, Laura Anderson Smith, U.S. Department of Justice, Washington, DC, for Respondents-Appellants.

Mary A. Kenney, San Antonio, TX, Judy Rabinovitz, American Civil Liberties Union Immigrants' Rights Project, New York City, for Lawyers' Committee for Civil Rights Under Law of Texas and American Civil Liberties Union, Amici Curiae.

Marc Hayes Robert, Karin Irene Converse, Albuquerque, NM, for National Association of Criminal Defense Lawyers, Amicus Curiae.

Donald Martin Kerwin, Catholic Legal Immigration Network, Alexandria, VA, for Catholic Legal Immigration Network, Inc., Amicus Curiae.

Paul Lindsey Hoffman, Santa Monica, CA, for Human Rights Watch and Human Rights Advocates, Amici Curiae.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before GARWOOD, DAVIS and BARKSDALE, Circuit Judges.

GARWOOD, Circuit Judge:

Petitioner-appellee Kestutis Zadvydas (Zadvydas) applied for a writ of habeas corpus pursuant to 28 U.S.C. § 2241. He alleged that since he is a stateless person and there is no possibility of effectuating his deportation to another country, his continued detention by respondents-appellants the Immigration and Naturalization Service (INS) and its district director (whose successor, Lynne Underdown, has been substituted as a party respondent-appellee) constitutes punishment without due process of law and thus violates his due process rights and international law. The district court granted the writ and ordered Zadvydas released from custody. *Zadvydas v. Caplinger*, 986 F.Supp. 1011 (E.D.La.1997). We reverse.

Facts and Proceedings Below

Zadvydas was born in a displaced persons camp in Germany in 1948. In 1956 he immigrated with his family to America, and became a resident alien. Despite his long residence in this country, he never became a citizen.[1] Starting as a youth, Zadvydas developed an extensive criminal history. His FBI records indicate numerous arrests. In 1966 he was convicted of attempted robbery in New York. In 1974 he was again convicted in New York, this time of attempted burglary. The INS began the process of deportation in 1977, based on these two convictions. While those proceedings were pending, Zadvydas was released into the community. After a lengthy delay, Zadvydas' motion for relief from deportation under 8 U.S.C. § 1182(c) was denied on February 10, 1982. Facing a hearing before an immigration judge that year, Zadvydas disappeared. Over the next decade, the INS failed to locate Zadvydas.

In 1987, authorities in Virginia arrested Zadvydas for possessing 474 grams of cocaine with intent to distribute. According to his own testimony, Zadvydas used cocaine at that time. While on bail awaiting trial in Virginia, Zadvydas fled to Houston, Texas. After several years in Texas, Zadvydas voluntarily presented himself to Texas authorities, and he was subsequently tried in Virginia on the 1987 distribution charge. In 1992, he was convicted and sentenced to sixteen years' imprisonment, with six years suspended. After serving only two years, Virginia released him on parole. The INS promptly took him into custody and reinitiated deportation proceedings. In March 1994 the immigration judge ordered that Zadvydas should be detained without bond during the deportation process based on his history of flight from authorities. Zadvydas appealed that determination, but the Board of Immigration Appeals (BIA) affirmed the immigration judge.

In 1994 Zadvydas appeared before the immigration judge. He admitted his past criminal history, conceded deportability, and seemed to indicate that he was a German citizen. He applied for relief from deportation under 8 U.S.C. § 1182(c). In May 1994 the immigration judge denied relief from deportation and ordered Zadvydas to be deported. Zadvydas did not appeal that decision, does not challenge it here, and it has become final. The INS immediately contacted the German government to arrange for deportation. German officials, however, proved unwilling to accept Zadvydas. They took the position that under German law the mere fact Zadvydas was born on German soil did not automatically entitle him to German citizenship. The INS, while continuing to

1. The record does not reveal whether Zadvydas ever applied for citizenship.

forward requests to Germany, contacted Lithuanian authorities in July 1994. The Lithuanians tersely responded that they could not accept Zadvydas since he was neither a citizen nor a permanent resident of Lithuania.

In May 1995, after the INS had forwarded to German authorities all the material they believed was necessary to establish Zadvydas' citizenship, the German authorities declined to accept Zadvydas. Referencing extensive research that they assertedly had conducted, they declared that Zadvydas was not a German citizen and thus could not be deported to Germany. Subsequent communications with the German authorities apparently did not generate a response. Based on the fact that Zadvydas' wife is a citizen of the Dominican Republic, the INS apparently wrote Dominican authorities. No Dominican response is in the record. In October 1996, the INS again contacted Lithuania to ascertain whether Zadvydas could claim citizenship. The Lithuanian government has since responded by stating that Zadvydas, while not one of their citizens, could apply for citizenship if he could prove that both of his parents were born in Lithuania prior to 1940. In letters dated October 26, 1998, and March 25, 1999, the Lithuanian government has broadly outlined the type of documentation it would require, and stated that Zadvydas should present such materials to it.

In September 1995, Zadvydas filed the instant petition for a writ of habeas corpus under section 2241, claiming that his continued detention violated the Eighth Amendment, the due process clause, and international law. In February 1997 the magistrate judge recommended denial of Zadvydas' habeas petition. Zadvydas filed objections. In November 1997 the district court found that continued detention of Zadvydas was unconstitutional. The court rejected all of Zadvydas' challenges to his deportation and the denial of his request for relief under section 1182(c), and it further ruled that his continued detention was authorized by 8 U.S.C. former § 1252(a)(2)(B) because he had not shown "that he is not a threat to the community and that he is likely to appear at any scheduled hearing." 986 F.Supp. at 1024.[2] However, concluding that Zadvydas was "stateless" and thus could "never be deported because there is no place to send him", the court held that Zadvydas could not be "permanently incarcerated" without violating his substantive due process rights. While the INS had procedures to review continuing detention, and Zadvydas thus could possibly be released in the future, the court discounted this possibility, finding that in practice there was "no end in sight" for Zadvydas' detention. 986 F.Supp. at 1027. The court ordered Zadvydas released under a list of conditions it generated. The INS timely appealed.[3] While this appeal has been pending, Zadvydas seems to have complied with the district court's release conditions and has apparently conducted himself as a productive member of society.

Discussion

[1, 2] The district court found that given the uncertainty that any nation would be found that would accept Zadvydas, his

2. Former section 1252(a)(2)(B) provided:
"The Attorney General may not release from custody any lawfully admitted alien who has been convicted of an aggravated felony, either before or after a determination of deportability, unless the alien demonstrates to the satisfaction of the Attorney General that such alien is not a threat to the community and that the alien is likely to appear before any scheduled hearings."
The district court further observed in this connection that the INS had also interviewed Zadvydas and reviewed his file and determined not to then release him under the similar standards of the Transition Period Custody Rules pursuant to section 303(b)(3)(B) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996. 986 F.Supp. at 1024-5 n. 4. The INS had determined thereunder that Zadvydas was "a threat to security as well as a flight risk."

3. Zadvydas has not cross-appealed.

detention was indefinite. It further found that such indefinite detention violated his substantive due process rights. The law, at least in this Circuit, regarding the long-term detention of excludable aliens pending deportation is clear—such detention is allowable. *See, e.g., Gisbert v. U.S. Attorney General*, 988 F.2d 1437, 1448 (5th Cir. 1993). Zadvydas argues, however, that these cases can have no application to his status since he is a resident alien and thus can claim enhanced constitutional protection. He maintains that even if the government may detain an excludable alien indefinitely, it violates substantive due process to inflict such detention on a resident alien such as himself.[4] The INS argues, however, that once a resident alien such as Zadvydas is—concededly in adherence with procedural and substantive due process—ordered deported and that order becomes final, the resident alien may claim no greater rights than an excludable alien in like circumstances. To the extent that the circumstances of this case require us to follow their logic, we agree with the INS.

I. Preliminary Matters

[3–5] As a threshold matter, we must address the question of this Court's jurisdiction. Although the INS contested the district court's jurisdiction below; it has not done so on appeal. We must nevertheless examine our own jurisdiction independently before proceeding. *See Arizonans for Official English v. Arizona*, 520 U.S. 43, 117 S.Ct. 1055, 1072, 137 L.Ed.2d 170 (1997). Congress has clearly indicated that it desires minimal judicial intrusion into deportation decisions. The strictest jurisdictional standard under which Zadvydas' claims could be evaluated are provided by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub.L. No. 104–208, 110 Stat. 309–546, which repealed the prior judicial review schemes governing immigration and substituted new provisions potentially applicable to Zadvydas. *See* 8 U.S.C. § 1252(g).[5] The Supreme Court has recently construed the jurisdictional effect of section 1252(g). *See Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471, 119 S.Ct. 936, 142 L.Ed.2d 940 (1999). In *Reno*, the Court held that the enactment was not a general bar, but rather limited judicial review of a narrow class of discretionary executive actions. By the statute's terms, one of the actions immune from review is an action to "execute removal orders against any alien under this chapter." In a recent case, the Seventh Circuit has held that these provisions do not remove our jurisdiction to hear a section 2241 habeas petition challenging the validity of the statutes authorizing the detention of aliens. This is because the detention, while intimately related to efforts to deport, is not itself a decision to "execute removal orders" and thus does not implicate section 1252(g) under *Reno*. *See Parra v. Perryman*, 172 F.3d 954, 957 (7th

4. Zadvydas also claims that his continued detention violates both international treaties and customary international law proscriptions of arbitrary detention. We do not believe that the continued detention here could be described as arbitrary. In any case, we rejected an identical international law claim in *Gisbert*. *See Gisbert*, 988 F.2d at 1448. We are unaware of any presently relevant distinction in international law between excludable and resident aliens, so for the purposes of adjudicating the application of international law *Gisbert* is directly controlling. Zadvydas' claims that his procedural due process and Eighth Amendment rights are violated by his continued detention were expressly not reached by the district court (986 F.Supp. at 1027 n. 6) and were not argued before us. We do not address them here.

5. Section 1252(g) provides:
"(g) Exclusive Jurisdiction
Except as provided in this section and notwithstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter."

Cir.1999). We agree, and find jurisdiction to hear this appeal.

[6] We next must address the statutory regime governing Zadvydas' continued detention. Zadvydas was released into INS custody in 1994. Since that time, a flurry of statutory changes have taken place. Zadvydas' detention could be covered by one of four separate detention regimes, depending on the degree of retroactivity involved. Two of them, the rule in place when he was initially detained, *see* 8 U.S.C. § 1252 (1994), and the Transition Period Custody Rules authorized in IIRIRA, place the burden on a detainee awaiting deportation to prove that he is not a danger to the community or a flight risk before being released on parole pending deportation. The third, most recent, provision—IIRIRA's permanent provision—authorizes detention but makes it discretionary beyond an initial ninety day period. *See* IIRIRA § 305(c), *codified* as 8 U.S.C. § 1231(a)(6), Immigration and Nationality Act (INA) § 241(a)(6).[6] From a constitutional perspective, the choice between these regimes appears to be of at most marginal import. However, the rules established by the immigration provisions of the Anti-Terrorism and Effective Death-Penalty Act (AEDPA) order mandatory detention of all aliens awaiting deportation, regardless of danger or flight risk. *See* AEDPA, Pub.L. 104-132 § 440(c), 110 Stat. 1214, 1277 (amending 8 U.S.C. § 1252(a)(2) to delete provisions allowing release of nondangerous nonflight-risk detainees).

[7] The parties agree that AEDPA § 440(c) does not apply, and both maintain that this case is governed by the new section 241 established by the IIRIRA, which they argue applies to all aliens who are not "in proceedings" at its effective date. It would seem clear that Zadvydas is not in deportation proceedings—the order regarding his deportation was issued and became final long before IIRIRA's effective date, and only the physical act of deportation remains undone. Moreover, the rapid passage of IIRIRA in the immediate wake of AEDPA seems to indicate that Congress repudiated the harsh mandatory detention regime created by AEDPA for aliens whose deportation is final. To apply AEDPA to Zadvydas based solely on the accident of when proceedings against him began would seem to make little sense—there is no reason to suspect that Congress determined that aliens in custody prior to the effective date of IIRIRA were, as a class, significantly more dangerous than those subsequently taken and thus merited harsher treatment. While the statute currently is not a model of clarity[7] in respect to its retroactive

6. Certain classes of aliens, including criminal aliens such as Zadvydas, "may be detained beyond the [90 day] removal period." 8 U.S.C. § 1231(a)(6).

7. IIRIRA's retroactivity clause, section 309(c)(1), bars application of its provisions "in the case of an alien who is in exclusion or deportation proceedings before" its effective date. The statute's section dealing with retroactivity is generally phrased in the present tense. The title to the section is, for example, "Transition for Aliens in Proceedings," and the clause applies to an alien who "is in" proceedings at the effective date. The natural reading of the clause would thus seem to be that it applies only to proceedings that are pending as of the effective date. *See American-Arab*, 119 S.Ct. at 943 (defining transitional cases under section 309(c)(1) as "cases pending on the effective date of IIRIRA"). *See also id.* at 945 (referring to "§ 309(c)(1)'s general rule" that IIRIRA's provisions "do not apply to pending cases"). The problem is created by the statute's usage of "before," which might be read to imply that the statute only affects those that were free of any involvement in deportation proceedings prior to the effective date. The confusing "before" was, however, the product of what was labeled as a "technical" amendment established by the Hatch-Kennedy amendment to the H-1A Nursing Bill. See Pub.L. 104-302, 110 Stat. 3657. Nothing indicates what the goal of this amendment was, and the failure of the amendment to change the surrounding language makes its intended purpose unclear. Accordingly, we find the text ambiguous enough to merit consideration of *Chevron*, particularly in light of the seeming absurdity of a contrary result and the constitutional problems it might possibly create.

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application to an alien in Zadvydas' position, we find the INS' construction reasonable. *See Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843-44, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). We conclude that Zadvydas' detention is governed by the new provisions of section 241.

Because we agree with the parties that new INA section 241 applies, we will proceed to analyze the constitutional question presented under the assumption that Zadvydas will be able to obtain periodic review of his detention. Under INA § 241(a)(1) & (2), 8 U.S.C. § 1231(a)(1) & (2), the Attorney General is required to remove an alien from the United States within the "removal period," defined generally as the ninety days beginning when an order of removal becomes administratively final, when any judicial review thereof is completed, or when the alien is released from confinement (other than under an immigration process), whichever is latest, and is required to detain the alien during the removal period. If the alien is not removed within the removal period, "the alien, pending removal, shall be subject to supervision under regulations prescribed by the Attorney General." *Id.* § (a)(3). INA § 241(a)(6), 8 U.S.C. § 1231(a)(6) provides:

"An alien ordered removed who is inadmissible under section 1182 of this title, removable under section 1227(a)(1)(C), 1227(a)(2)[8], or 1227(a)(4) of this title or who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, may be detained beyond the removal period and, if released, shall be subject to the terms of supervision in paragraph (3)." (Emphasis added).

INS regulations, *see* 8 C.F.R. §§ 236.1(d)(2)(ii), 236.1(d)(3)(iii), 241.4 & 241.5, as explained and expounded in the February 3, 1999, "Memorandum for Regional Directors" from INS Executive Associate Commissioner Michael A. Pearson concerning "Detention Procedures for Aliens Whose Immediate Repatriation Is Not Possible or Practicable," authorize the release of such aliens when it is determined that the alien "is not a threat to the community and is likely to comply with the removal order," and further provide that the alien must be given the opportunity to so demonstrate, that every six months the District Director must "review the status of" such "aliens ... to determine whether there has been a change in circumstances that would support a release decision," that the alien's file must be documented to show "the reasons for the custody or release decision," and that "if the alien submits a written request to have his detention status reviewed by the District Director ... the alien may appeal the District Director's decision to the Board of Immigration Appeals."[9]

8. 8 U.S.C. § 1227(a)(2). INA § 237(a)(2), includes aliens, such as Zadvydas, convicted of an aggravated felony or a controlled substance violation.

9. The Pearson memorandum states in pertinent part:

"... 8 C.F.R. § 241.4 gives the District Director the authority to make release decisions beyond the removal period based on specific criteria in the regulation as set forth below. The regulation also provides that the District Director should provide an alien with the opportunity to demonstrate by clear and convincing evidence that he is not a threat to the community and is likely to comply with the removal order. The alien may be given this opportunity in writing, orally, or a combination thereof. The District Director must ensure that the file is documented with respect to the alien's opportunity to present factors in support of his release, and the reasons for the custody or release decision.

...

Every six months, the District Director must review the status of aliens detained beyond the removal period to determine whether there has been a change in circumstances that would support a release decision since the 90 day review. Further, the District Director should continue to make every effort to effect the alien's removal both before and after the expiration of the removal period. The file should document these efforts as well.

The district court found that the INS did not err in determining that Zadvydas posed a danger to the community and a flight risk. Should Zadvydas no longer do so, he would doubtless be released.

II. *Gisbert* and Excludable Aliens

[8–10] Article I, section 8, clause 4 of the Constitution vests in Congress the power to "establish an uniform Rule of Naturalization." Moreover, "[t]he exclusion of aliens is a fundamental act of national sovereignty" that "stems not alone from legislative power but is inherent in the executive power to control the foreign affairs of the nation." *See United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 70 S.Ct. 309, 312, 94 L.Ed. 317 (1950). *See also Chae Chan Ping v. United States*, 130 U.S. 581, 9 S.Ct. 623, 630, 32 L.Ed. 1068 (1889) (discussing sovereignty justification). The basic source of this interest is identical regardless of whether the government seeks to exclude an alien who has not entered, or to expel an alien who has resided here. *See Fong Yue Ting v. United States*, 149 U.S. 698, 13 S.Ct. 1016, 1019, 37 L.Ed. 905 (1893) ("The right ... a nation to expel or deport foreigners who have not been naturalized ... is as absolute and unqualified, as the right to prohibit and prevent their entrance into the country."). When these principles are taken together, it is clear that "the power to expel or exclude aliens [is] a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control." *Fiallo v. Bell*, 430 U.S. 787, 97 S.Ct. 1473, 1478, 52 L.Ed.2d 50 (1977) (quoting *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 73 S.Ct. 625, 628, 97 L.Ed. 956 (1953)). *See also Harisiades v. Shaughnessy*, 342 U.S. 580, 72 S.Ct. 512, 519, 96 L.Ed. 586 (1952) ("It is pertinent to observe that any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government. Such matters are so exclusively entrusted

District Directors are advised that a detention review is subject to the provisions of 8 C.F.R. § 236.1(d)(2)(ii) if the alien submits a written request to have his detention status reviewed by the District Director. Under 8 C.F.R. § 236.1(d)(2)(iii), the alien may appeal the District Director's decision to the Board of Immigration Appeals. Where the alien has not made a written request to have his custody status reviewed, however, there is no provision for appeal of the District Director's decision to the Board of Immigration Appeals. *See* 8 C.F.R. § 241.4."

8 C.F.R. § 241.4(a) provides:

"(a) *Continuation of custody for inadmissible or criminal aliens.* The district director may continue in custody any alien inadmissible under section 212(a) of the Act or removable under section 237(a)(1)(C), 237(a)(2), or 237(a)(4) of the Act, or who presents a significant risk of noncompliance with the order of removal, beyond the removal period, as necessary, until removal from the United States. If such an alien demonstrates by clear and convincing evidence that the release would not pose a danger to the community or a significant flight risk, the district director may, in the exercise of discretion, order the alien released from custody on such conditions as the district director may prescribe, including bond in an amount sufficient to ensure the alien's appearance for removal. The district may consider, but is not limited to considering, the following factors:

(1) The nature and seriousness of the alien's criminal convictions;

(2) Other criminal history;

(3) Sentences of imposed and time actually served;

(4) History of failures to appear for court (defaults);

(5) Probation history;

(6) Disciplinary problems while incarcerated;

(7) Evidence of rehabilitative effort or recidivism;

(8) Equities in the United States; and

(9) Prior immigration violations and history."

The release of an alien under section 241.4 shall be under a supervision order requiring, *inter alia*, periodic reporting to the INS, continued efforts to obtain travel documents, advance approval of travel beyond any therein specified limits, and giving notice of change of address; a bond may also be required; and, the INS "may grant employment authorization to an alien" released under section 241.4. *See* C.F.R. § 241.5.

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to the political branches as to be largely immune from judicial inquiry or interference."). The power of the national government to act in the immigration sphere is thus essentially plenary.

[11, 12] Aliens can of course claim some constitutional protections. The language of the due process clause refers to "persons," not "citizens," and it is well established that aliens within the territory of the United States may invoke its provisions. *See, e.g., Yick Wo v. Hopkins*, 118 U.S. 356, 6 S.Ct. 1064, 1070, 30 L.Ed. 220 (1886); *Wong Wing v. United States*, 163 U.S. 228, 16 S.Ct. 977, 981, 41 L.Ed. 140 (1896) (illegal resident alien could not be punished by sentence to hard labor without due process of law). While the cases have drawn a line for some purposes between excludable aliens who failed to effect entry into the country unimpeded and resident aliens, in this Circuit it is clear that the former also can be considered persons entitled to protection under the 14th Amendment. *See Lynch v. Cannatella*, 810 F.2d 1363, 1375 (5th Cir.1987) ("Excludable aliens are not non-persons."). We cannot suppose that the result in *Wong Wing* would have been different had the alien there been excludable rather than resident.

[13, 14] However, alien status can affect our analysis of constitutional rights. Because of their special position, certain classifications and restrictions that would be intolerable if applied to citizens are allowable when applied to resident aliens. *See, e.g., Cabell v. Chavez-Salido*, 454 U.S. 432, 102 S.Ct. 735, 740, 70 L.Ed.2d 677 (1982) (state's exclusion of resident aliens from basic governmental functions did not violate the constitution).[10] *See also DeCanas v. Bica*, 424 U.S. 351, 96 S.Ct. 933, 47 L.Ed.2d 43 (1976). More importantly for the issue before us, courts have long recognized that the governmental power to exclude or expel aliens may restrict aliens' constitutional rights when the two come into direct conflict. *See Mathews v. Diaz*, 426 U.S. 67, 96 S.Ct. 1883, 1891, 48 L.Ed.2d 478 (1976) ("In the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens."). Indeed, the Court has accepted collateral damage to the constitutional rights of citizens as an acceptable price to pay in deference to the plenary power over aliens of the political branches of the national government. *See Kleindienst v. Mandel*, 408 U.S. 753, 92 S.Ct. 2576, 2582–84, 33 L.Ed.2d 683 (1972) (recognizing citizen audience had First Amendment interest in listening to communist agitator, but accepting government's exclusion of alien speaker despite this interest). *See also United States v. Williams*, 194 U.S. 279, 24 S.Ct. 719, 48 L.Ed. 979 (1904).

[15, 16] Zadvydas claims that his detention amounts to punishment without trial, and thus violates his substantive due process liberty interest. It is well established that resident aliens may not be punished in this manner. *See Wong Wing*, 16 S.Ct. at 981. However, the *Wong Wing* court distinguished between the unconstitutional act before it—which made illegal presence in the country summarily punishable by a sentence to being "imprisoned at hard labor" for not more than a year and provided that the alien would be "*thereafter* removed from the United States" (emphasis added)—and detention pending deportation. "Proceedings to exclude or expel would be in vain if those accused could not be held in custody pending the inquiry into their true character, and while arrangements were being made for their deportation." *Id.* at

10. Further, "the Fourteenth Amendment's limits on state powers are substantially different from the constitutional provisions applicable to the federal power over immigration and naturalization." *Mathews v. Diaz*, 426 U.S. 67, 96 S.Ct. 1883, 1895, 48 L.Ed.2d 478 (1976). Thus, provisions in state laws respecting aliens which would be invalid under the Fourteenth Amendment are not necessarily invalid when contained in federal legislation. *Id.* at 1893–95.

980. We have clearly held t excludable aliens may be detained pending deportation without such detention constituting unconstitutional punishment, even when the aliens' country of origin indicates it will not accept their return. *See Gisbert v. U.S. Attorney General*, 988 F.2d 1437, 1448 (5th Cir.1993). *See also Barrera-Echavarria v. Rison*, 44 F.3d 1441, 1450 (9th Cir.1995) (*en banc*) (accord with *Gisbert*).

[17] *Gisbert* dealt with the detention of a group of Cubans who were part of the Mariel boatlift. After detaining these aliens prior to entry—thus ensuring that they were excludable aliens—the United States decided that they should be returned to their country of origin. Castro refused to accept their return, however, and the aliens were released on immigration parole. Due to the working of the "entry fiction," [11] the aliens retained their excludable status despite their freedom on American soil. All of the aliens in *Gisbert* then committed, and were convicted of, crimes while on parole. After their release from the criminal justice system, the aliens were detained pending deportation to prevent any further criminal acts. In *Gisbert*, as under the provisions here, there was a procedure that allowed the detained alien to be released from detention while deportation was still impractical. *See id.* at 1443 n. 11 (detailing annual review procedures that allowed release of aliens found not to present a danger to the community).

The aliens did not challenge the conditions of their confinement or the procedures used in the initial decision to deport them. They instead argued that their continued confinement constituted punishment without a criminal trial and thus violated their substantive due process rights. They emphasized the fact that in light of Castro's refusal to accept their deportation, their confinement was potent indefinite. We rejected these arguments and held that the continued, indefinite detention of the aliens did not violate their constitutional rights. In reaching this result, we relied on the Court's decision in *Mezei*, in which it allowed the indefinite detention of an excludable alien who had been ordered permanently excluded and could find no nation to receive him. *See Mezei*, 345 U.S. 206, 73 S.Ct. 625, 97 L.Ed. 956. Drawing on the reasoning of *Mezei*, we found that detention pending deportation does not constitute punishment, since the detention could rationally be seen as a necessary byproduct of the need to expel an unwanted alien rather than a punitive decision. *Gisbert*, 988 F.2d at 1442. The continued detention of Mariel Cubans thus did not constitute punishment without trial in violation of the aliens' substantive due process rights, even though there was no guarantee that deportation could be effectuated in the near future.

Zadvydas attempts to distinguish *Gisbert* and *Mezei* on the ground that he is a resident alien, and thus is entitled to a greater degree of substantive due process protection than the excludable aliens in those cases. Zadvydas' resident alien status surely entitled him to greater *procedural* rights in the determination of whether he was entitled to remain in the United States than were granted the excludable aliens in those cases. However, Zadvydas does not challenge here the procedures used by the government in deciding to deport him, or the final result. His only complaint is with the detention itself. As explained in part IV below, we do not believe that the difference between excludable aliens and resident aliens mandates a radical departure from the reasoning of *Gisbert* when, as here, a final decision to deport the once resident alien has been made and stands unchallenged.

11. The fact that, for humanitarian or administrative reasons, the government chooses to allow excludable aliens into the country while their cases are pending does not alter their status if they were initially properly detained at the border. *See, e.g., Ahrens v. Rojas*, 292 F.2d 406, 410 (5th Cir.1961).

III. Permanent Co

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III. Permanent Confinement

The district court held that Zadvydas' detention violated his substantive due process rights because it constituted "permanent confinement" in that he "will never be deported because there is no place to send him." 986 F.Supp. at 1026, 1027. We conclude that these reasons considerably overstate the matter.

To begin with, Zadvydas may be released when it is determined that he is no longer either a threat to the community or a flight risk, and he is entitled to automatic review of his case for this purpose every six months, with opportunity to present factors in support of his release, and, where his written application for release has been denied by the district director, he may appeal that decision to the BIA. See note 9, *supra*, and accompanying text. In *Barrera-Echavarria*, the en banc Ninth Circuit concluded that analogous annual INS administrative review for release under similar standards precluded characterization of the alien's detention as "'indefinite' or 'permanent.'" 44 F.3d at 1450.[12]

Nor can it now be said with any real assurance that Zadvydas "will never be deported." To be sure, it is clear that due to an unfortunate combination of circumstances, locating a country to which Zadvydas may be deported has been and will be difficult at best; but that there is no meaningful possibility of doing so has not been clearly established. And, precisely because of the complexities involved, more time than usual will doubtless in any event be required.

The problem of deporting Zadvydas has its roots in the tortured twentieth century history of what is now Lithuania. Up until the German defeat in World War One, portions of Lithuania were located in Germany. Zadvydas' mother was born in that section of modern Lithuania—then known as the Memel region, now called Klaipeda—in 1919. Six years earlier (according to his own account in an affidavit prepared to secure his post-war immigration to America), Zadvydas' father had been born in Mazeikiai, which is located on the Baltic coast outside of the disputed Memel region and thus would presumably have been under Russian control at the time of his birth. As part of the Versailles Treaty, Germany ceded the Memel region to the Allies. Lithuania, having renewed its existence as an independent state, successfully laid claim to the area and occupied it in 1923. At that point, Zadvydas' mother and father presumably would both have been Lithuanian citizens, since they were apparently born within the resurrected nation's current borders.

However, in 1939 Germany issued an ultimatum to Lithuania demanding the return of the Memel region, referencing the alleged plight of ethnic Germans under Lithuanian rule. The territory was then handed back to Germany, and (if she was still living in the region) Zadvydas' mother then would have become a subject of Nazi Germany. Unlucky in neighbors, Lithuania then had its independence extinguished by Stalin's 1940 invasion, which placed Zadvydas' father in the Soviet orbit (again, presuming he lived near his claimed home town at the time). *See generally* Algimantas Gureckas, *Lithuania's Boundaries and Territorial Claims Between Lithuania and Neighboring States*, 12 N.Y.L. Sch. J. Int'l & Comp. L. 107 (1991). Hitler then invaded the Soviet Union in 1941, and Lithuania was under German occupation for most of the Second World War. Late in that conflict, the Soviet army reoccupied Lithuania. The Soviets did not reestablish the Lithuanian independence they had earlier snuffed out, and Lithuania remained a captive to Soviet tyranny until 1991. In the midst of all this, Zadvydas' parents were married in 1943. At some point, the couple moved (or fled) to Germany, where their first child was born in 1944. The

12. We also note that at a certain point—which Zadvydas may be approaching—age alone would likely weigh heavily against an INS finding of continued danger to the community or flight risk.

family spent the immediate pos years in displaced person camps in Germany. On Nov. 21, 1948, Zadvydas was born in one of these camps. In 1956 the family immigrated to America.

Due to these events, Zadvydas may in a sense be stateless. While born in Germany, he cannot claim German citizenship on that basis alone, because under German law citizenship hinges on blood (*jus sanguinis*) rather than place of birth (*jus soli*). Lithuania would seem to be the obvious alternative. Lithuanian *sanguinis* may be able to substitute for Zadvydas' birth outside of Lithuania. According to the communications from the Lithuanian government, Zadvydas can apply for Lithuanian citizenship if both his parents were born in Lithuania prior to the Soviet invasion in 1940.[13] According to their own accounts, both parents would qualify under this standard. The difficulty that has so far delayed the process seems to be the need to document this fact. There is a baptismal certificate indicating his mother's birth in the Memel region, which is now part of Lithuania.[14] However, there is no corresponding documentation demonstrating that Zadvydas' father was born in Mazeikiai. The only evidence th s been unearthed up to this point is his affidavit upon entering the United States, which claimed birth in Lithuania.

The Lithuanian government, in letters dated October 26, 1998, and March 25, 1999, indicated that Zadvydas might apply for citizenship, but would have to personally and formally request it, and present documentation of his parent's birth. The INS had previously presented most of the available documentation—the baptismal certificate and Zadvydas' father's affidavit—in its communications with Lithuania. It is not clear, however, whether these materials were examined by the Lithuanians as support for an application for citizenship, rather than as part of a claim that Zadvydas already possessed citizenship. Certainly there has been no definitive denial by Lithuania of any application for citizenship by Zadvydas. Accordingly, it is premature to assume that the Lithuanians will reject Zadvydas based on the current documentation. Even if they were to demand more reliable evidence of his father's birthplace, there is no basis on which to conclude that more cannot be uncovered. After all, it does not seem disputed that he

13. Lithuania's citizenship laws are apparently designed to give preference to ethnic Lithuanians over the large number of ethnically Russian immigrants who established themselves in the years of communist occupation. The requirement of proving birth of one's ancestors in Lithuanian territory neatly differentiates the two populations. *See* Ruta M. Kalvaitis, *Citizenship and National Identity in the Baltic States*, 16 Bos. U. Int'l L.J. 231 (1998). This seems to be merely a variant of the *jus sanguinis* principal. It should be noted that the blood citizenship laws that must be navigated here would appear to administratively function somewhat differently from American birth citizenship laws. Because birth alone is not sufficient, it appears that under Lithuanian practice one (or one's parents) has to affirmatively apply for citizenship. The fact that Lithuania is asserting that Zadvydas must apply for citizenship may thus not be unusual. It does seem to have caused some confusion in the communications between the INS and Germany and Lithuania. The INS continually asked for confirmation that Zadvydas was a citizen, rather than framing the matter as an application for citizenship. Given the circumstances of Zadvydas' birth, it would seem unlikely that his parents paused to put him in the national registry of either country. While perhaps understandable, this confusion may have slowed the process here.

14. Zadvydas attempts to argue that the fact that at the time Zadvydas' mother was born the status of the Memel region was unsettled indicates that she could not claim Lithuanian citizenship. Nothing in the record supports this theory, and it would seem contrary to ordinary practice. *See Restatement Third, Restatement of the Foreign Relations Law of the United States* § 208, comment *c*; *id.* Reporters' Note 3 ("Normally, the transfer of territory from one state to another results in a corresponding change in nationality for the inhabitants of that territory"). While there is some evidence that Zadvydas's mother considered herself stateless, or German, this may not accurately track Lithuanian nationality law.

was born in what became Lithuania. For example, a search of the public records in Mazeikiai or elsewhere (so far apparently unperformed anywhere by anyone) might prove fruitful. To be sure, such efforts may ultimately prove unsuccessful. And even if unimpeachable evidence of Lithuanian parentage is produced, there is a hint in the record that Lithuania might be able to reject Zadvydas' application based on his criminal record. However, there is no basis for finding that any ability of Zadvydas to become a Lithuanian citizen, and hence deportable there, has been definitively foreclosed.

Also, apart from Lithuania, two other potential options appear to remain unexplored. The record indicates that the German government, in a letter dated May 1995, has definitively rejected the INS' efforts to deport Zadvydas to Germany and mentioned "extensive research" establishing that he is not a German citizen. If—as it appears—the only evidence put forth by the INS was Zadvydas' birth in Germany, this decision would seem justified under the *jus sanguinis* principle. However, it would seem that another argument, as yet apparently untapped, might properly be advanced to justify Zadvydas' German citizenship. Zadvydas may in fact have German blood, and thus qualify under *jus sanguinis*.

After World War Two, German law allowed members of ethnic German communities—some of which, such as the "Volga Germans," had been separated from Germany proper for centuries—to claim citizenship under far more lenient terms than applied to foreigners generally. *See* Note, *Deutschland ist Doch ein Einwanderungsland Geworden: Proposals to Address Germany's Status as a "Land of Immigration,"* 30 Vand. J. Transnat'l L. 905, 916–923 (1997). Zadvydas' mother was born in the Memel region in 1919. Prior to its defeat in World War One, this region was part of Germany. It would thus seem reasonably possible that Zadvydas' mother could be considered an ethnic German—indeed, her birth documentation is in German, not Lithuanian or Polish. It lists her maiden name as Steffan, and her mother's maiden name as Jackshies. It is not obvious to us that these are non-Germanic names. Perhaps Zadvydas could apply for German citizenship claiming ethnic German ancestry.[15] Obviously, the success of such an approach is far from assured—and even if Zadvydas' ethnic status can be shown, his presence in the United States, lack of language skills, or what seems to be his father's likely un-Teutonic ethnicity might defeat such an application. *But see id.* at 923 ("Judicial interpretation and administrative application of the statutes governing naturalization of ethnic Germans have established that the threshold for proving oneself to be an ethnic German is very low.").

A final potential option, apparently completely unexplored, is to attempt to claim Russian citizenship for Zadvydas. Wherever Zadvydas' parents were born, it seems undisputed that their birthplaces would have been inside the borders of the Soviet Union at its post-war height. Russia has apparently been liberal in granting citizenship to former citizens of the Soviet Union now living outside of Russia's borders. See Kalvaitis, *National Identity in the Baltic States*, 16 Bos. U. Int'l L.J. at 240 n. 64. It is noted in an INS affidavit that Zadvydas' mother travels to Russia frequently. Before the immigration judge Zadvydas seemed to indicate that these visits were to visit family.[16] An INS letter indicates the Zadvydas's mother has a sister in Russia whom she visits every year.

15. There is nothing to indicate that the mother's potential German ethnicity would in any way affect parallel efforts to obtain Lithuanian citizenship. Lithuania's laws appear to be solely focused on the problem of Russian immigrants.

16. When the immigration judge asked whether Zadvydas was aware of any relatives he might have in Germany on his mother's side who she was in contact with, Zadvydas replied "no, she goes to Russia."

If Zadvydas does indeed ha a aunt living in Russia, he might perhaps qualify for citizenship there. The record does not reveal the details of this apparent family relationship, nor does it contain a discussion of Russian citizenship law. Again, then, success obviously cannot be presumed. The point is that the record indicates that there may be some slight possibility of this, and that this possibility is apparently wholly unexplored.

As the preceding discussion indicates, the unfortunate historical context of Zadvydas' birth makes untangling his true nationality highly difficult and time consuming at best. But that does not mean impossible. Continued efforts might eventually produce a breakthrough with Lithuania—and, if required, further proof of his father's birth may ultimately be unearthed. And avenues for claiming German and Russian citizenship remain unexplored. Nor is it clear that the Dominican situation has been fully explored. While the delay here is long, it appears to be what one could expect given the tangled circumstances and inadequate documentation. Given the traditional deference we show to the other branches in matters of immigration policy, judicial intrusion should not be considered, particularly where there are reasonable avenues for parole, until there is a more definitive showing that deportation is impossible, not merely problematical, difficult, and distant. However, it is certainly no clearer here that Zadvydas "will never be deported because there is no place to send him" than it was respecting the aliens in *Gisbert*, and here, as also in *Gisbert*, 988 F.2d at 1447, the government is continuing its efforts to effect Zadvydas' removal.

IV. Substantive Due Process and Detention of a Resident Alien Validly Ordered Deported

Zadvydas argues that as a resident alien he has greater rights under these circumstances than an excludable alien would, and thus that his current detenti a form of punishment unjustified by any criminal conviction despite the result in cases such as *Mezei* and *Gisbert* involving excludable aliens. However, there is little, if any, room for a distinction between the rights in this respect of excludable and resident aliens when their circumstances are so similar. Zadvydas' detention is currently within the core area of the government's plenary immigration power and thus does not violate substantive due process.

[18-21] The differences that exist in the rights of excludable and resident aliens are not the product of some bright line division that places excludable aliens beyond the pale of constitutional scrutiny. Excludable aliens are persons, entitled to some due process, and other, constitutional protections. The fact that they are entitled to a lesser degree of procedural due process in proceedings to determine whether they may enter the country stems ultimately not from their status as such, but rather from the nature of what is asserted. An attempt to enter this country is a request for a privilege rather than an assertion of right. *See Landon v. Plasencia*, 459 U.S. 21, 103 S.Ct. 321, 329, 74 L.Ed.2d 21 (1982). Denial of entry is thus not a deprivation of rights subject to procedural due process, and that, coupled with our deference to the other branches, mandates that we leave it to Congress to determine the procedures to be used in adjudicating such claims. *See, e.g., Knauff*, 70 S.Ct. at 313 ("Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned."). In practice, this determination may foreclose most constitutional challenges on behalf of excludable aliens and create the impression that they have no constitutional rights. They have no procedural rights with regard to their entry, and most of their substantive rights will be constrained by the government's need to control immigration. *See, e.g., Gisbert*, 988 F.2d at 1448. Since many will never enter the country or will do so only briefly, they will have little opportunity to assert *Yick Wo*-type rights in matters unconnected to the plenary power. However, to the extent that their substantive rights are infringed—either during the immigration process or while they are on parole subject to the entry fiction—in a manner that cannot be connected to the immigration power, they may assert such rights. *See Lynch*, 810 F.2d at 1374–75 (excludable aliens are persons, and thus allowed to bring suit against allegedly brutal government agents since "we cannot conceive of any national interests that would justify the malicious infliction of cruel treatment").

[22, 23] Resident aliens, by virtue of their presence here, develop an interest in remaining that, to a certain extent, entitles them to procedural due process before they may be removed from this country. *See, e.g., Landon*, 103 S.Ct. at 329 (in a discussion limited to procedural due process rights, noting "once an alien gains admission to our country and begins to develop the ties that go with permanent residence his constitutional status changes accordingly. Our cases have frequently suggested that a continuously present resident alien is entitled to a fair hearing when threatened with deportation [citations], and, ... we developed the rule that a continuously present permanent resident alien has a right to due process in such a situation.").[17]

[24] However, the fact that resident alien status entitles one to due process respecting the decision to deport does not mean that the plenary power concept is extinguished. On the contrary, the needs of the government are taken into account in evaluating such claims and the standard for evaluating procedures is thus lower than would be expected in analyzing the rights of a citizen with a like interest. *See Landon*, 103 S.Ct. at 330 (resident alien who has not severed her ties to the country is entitled to due process before being removed, but in evaluating procedures "it must weigh heavily in the balance that control over matters of immigration is a sovereign prerogative"); *Galvan v. Press*, 347 U.S. 522, 74 S.Ct. 737, 742, 98 L.Ed. 911 (1954) (noting that while deportation of a long term resident alien is drastic measure with consequences analogous to those stemming from a criminal conviction, plenary power precedent mandates nonapplicability of the *ex post facto* clause); *I.N.S. v. Lopez-Mendoza*, 468 U.S. 1032, 104 S.Ct. 3479, 3483, 82 L.Ed.2d 778 (1984) (deportation, despite the weighty interests involved, is a civil proceeding and not subject to the same battery of procedural protections as would govern a criminal trial); *United States ex rel. Bilokumsky v. Tod*, 263 U.S. 149, 44 S.Ct. 54, 56, 68 L.Ed. 221 (1923) (involuntary confession admissible in deportation hearing).

[25, 26] Nothing in these cases suggests that a resident alien has a broadly privileged constitutional status relative to excludable aliens, or is constitutionally entitled to more favorable treatment when both the right asserted and the governmental interest are identical to those in the parallel case of an excludable alien.[18] The constitutional rights of resident aliens may certainly be affected by the plenary power. *See, e.g., Fong Yue Ting*, 13 S.Ct. at 1026 (in case involving rights of a resident alien, distinguishing *Yick Wo* on the grounds

17. Indeed, as *Landon* reflects, those rights extend to resident aliens seeking reentry after a brief trip abroad not meaningfully interruptive of the alien's continued United States residence. *Id.* 103 S.Ct. at 329–330.

18. In *Landon*, the court noted that a resident alien had greater substantive rights under the immigration *statutes*. *See Landon*, 103 S.Ct. at 326. In *Gisbert*, we referenced this discussion of statutory treatment and concluded that resident aliens "generally are granted greater substantive rights than are excludable aliens." *Gisbert*, 988 F.2d at 1440. Nothing in this discussion can be read to imply that there is an across-the-board difference in the constitutional (as opposed to statutory or regulatory) status of the two categories of aliens.

that "[t]he question there was of the power of a state over aliens continuing to reside within its jurisdiction, not of the power of the United States to put an end to their residence in the country"); *Wong Wing*, 16 S.Ct. at 981 (drawing distinction between "the power of congress to protect, by summary methods, the country from the advent of aliens ... or to expel such if they have already found their way into our land, and unlawfully remain therein" and the decision to imprison aliens at hard labor for a term notwithstanding the ability to rapidly remove the alien from the national community). Both excludable and resident aliens have the right to be free of abuses that—while tangentially and remotely related to the immigration process—cannot be justified as in furtherance of immigration goals. *See Lynch*, 810 F.2d at 1375 (excludables); *Wong Wing*, 16 S.Ct. at 981 (resident). But both excludable and resident aliens may come in conflict with the government's sovereignty interests, and when this occurs their rights are constrained accordingly and to the same extent. As applied to detention pending removal, any here relevant constitutional distinction between excludable and resident aliens who have each been properly and finally determined to be removable would necessarily rest on a conclusion that excludable aliens are nonpersons wholly unprotected by the Constitution. However, that conclusion would conflict with our holding in *Lynch* and would require us to conclude that aliens in the position of those in *Gisbert* could be statutorily subjected to the rack and the screw, the Eighth Amendment notwithstanding.

In the circumstances presented here, the national interest in effectuating deportation is identical regardless of whether the alien was once resident or excludable. When a former resident alien is—with the adequate and unchallenged procedural due process to which his assertion of a right to remain in this country entitles him—finally ordered deported, the decision has irrevocably been made to expel him from the national community. Nothing remains but to effectuate this decision. The need to expel such an alien is identical, from a national sovereignty perspective, to the need to remove an excludable alien who has been finally and properly ordered returned to his country of origin. *See Fong Yue Ting*, 13 S.Ct. at 1022 (the "power to exclude aliens, and the power to expel them, rest upon one foundation, are derived from one source, are supported by the same reasons, and are in truth but parts of one and the same power"). Whether the party to be deported is an excludable or a former resident, the United States has properly made its decision and earnestly wishes—if for no other reason than to save the cost of detention—to deport the detainee. And deportation itself is not punishment. *See INS v. Lopez-Mendoza*, 104 S.Ct. at 3483 ("The purpose of deportation is not to punish past transgressions, but rather to put an end to a continuing violation of the immigration laws."); *American-Arab*, 119 S.Ct. at 947 ("Even when deportation is sought because of some act the alien has committed, in principle the alien is not being punished for that act (criminal charges may be available for that separate purpose) but is merely being held to the terms under which he was admitted. And in all cases, deportation is necessary in order to bring to an end *an ongoing violation* of United States law.").

The fact that deportation cannot be immediately effectuated would not seem to recreate a distinction in the government's interest regarding excludable aliens and resident aliens. When deportation is somehow blocked, the government must worry about two things. If the alien is not detained, he may commit crimes against the general population—crimes he would have been unable to commit had the decision to deport been effectuated. The whole *point* of earmarking criminal aliens for deportation or exclusion is that while we must tolerate a certain risk of recidivism from our criminal citizens, we need not be similarly generous when it comes to those who have not
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those who have not achieved citizenship. Their presence in this country is thus a continuing violation of the immigration laws, and if the preferred method of ending this violation is unavailable, detention may be an acceptable alternative mechanism to achieve the ultimate goal. *See Gisbert*, 988 F.2d at 1442 (noting protection of society from potentially dangerous alien was a rational, nonpunitive purpose for detention). *See also Tran v. Caplinger*, 847 F.Supp. 469, 476 (W.D.La.1993) ("This court can find no logical basis to conclude that the detention of a deportable alien under these circumstances is 'punishment' while the detention of an excludable alien is not").[19] In addition, when deportation becomes feasible, the alien may frustrate the process by disappearing within the country, as so many have done. If the government's efforts eventually make deportation feasible, it will be unable to effectuate its decision to expel if the alien has fled and gone underground in the interim. These interests are both equally potentially present regardless of whether an alien was once resident or excludable.

[27] Once the decision is made to deport a resident alien, then, there is little, if any, difference in the government's interest in effectuating deportation of a resident alien and expulsion of an excludable alien. There is thus nothing to adequately distinguish the plenary interest from the one encountered in *Gisbert*. To the extent that Zadvydas had greater rights than the excludable aliens there, such rights were, so far as here relevant, procedural rights respecting the deportation decision, and have concededly been honored. We hold that the government may detain a resident alien based on either danger to the community or risk of flight while good faith efforts to effectuate the alien's deportation continue and reasonable parole and periodic review procedures are in place.[20]

Conclusion

For the reasons stated, the judgment of the district court is

REVERSED.

19. Pre-trial detention of citizens charged with a serious crime—but presumptively innocent—may be justified by the government's interest in protecting the public. *See United States v. Salerno*, 481 U.S. 739, 107 S.Ct. 2095, 2103, 95 L.Ed.2d 697 (1987). The Court has allowed indefinite detention of a citizen as long as there has been a finding of continued danger and "some additional factor" is present. *See Kansas v. Hendricks*, 521 U.S. 346, 117 S.Ct. 2072, 2080, 138 L.Ed.2d 501 (1997). In *Hendricks*, the special circumstance or additional factor was a diagnosis of pedophilia, and the Court upheld a statute that allowed indefinite detention of such persons as long as periodic review was available to certify that the detainee remained dangerous and mentally ill. *Cf. Foucha v. Louisiana*, 504 U.S. 71, 112 S.Ct. 1780, 1788, 118 L.Ed.2d 437 (1992) (indefinite detention of person acquitted by reason of insanity after medical diagnosis indicated he was no longer mentally ill could not be justified by danger alone). *See also Gisbert*, 988 F.2d at 1441 n. 6 (distinguishing *Foucha* on the grounds it involved a citizen and a case where "the basis for holding him in that facility had ceased to exist"). We note this only to demonstrate that detention of certain classes of persons to protect society at large is not wholly alien to our constitutional order and has been allowed in special situations when, as here, there are procedures to insure that detention must be periodically reviewed.

20. We are aware of the recent joint opinion of five district judges in the Western District of Washington in *Binh Phan et al. v. Reno et al.* (Nos. C98-2342, C99-177C, C99-185R, C99-341WD, & C99-151L, W.D. Wash. July 9, 1999), which reaches a contrary result. We decline to follow that decision because it rests on a categorical distinction between the detention pending expulsion of deportable aliens who have been finally and properly ordered deported and the detention pending expulsion of excludable aliens who have been finally and properly ordered removed, a distinction which for these purposes we have rejected for the reasons stated in the text.

APPENDIX "C"

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 97-31345

U.S. COURT OF APPEALS
FILED
OCT 13 1999
CHARLES R. FULBRUGE III
CLERK

KESTUTIS ZADVYDAS

Petitioner - Appellee

v.

LYNNE UNDERDOWN; U S IMMIGRATION AND NATURALIZATION SERVICE,

Respondents - Appellants

Appeal from the United States District Court for the Eastern District of Louisiana, New Orleans

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ON PETITION FOR REHEARING EN BANC

(Opinion 8/11/99, 5 Cir., _____, _____ F.3d _____)

Before GARWOOD, DAVIS, and BARKSDALE, Circuit Judges.

PER CURIAM:

(✓) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

United States Circuit Judge

CLERK'S NOTE:

SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.